2013 IL App (3d) 110680-U

Order filed January 18, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

MARVIN RIEKER,	)	Appeal from the Circuit Court
	)	of the 13th Judicial Circuit,
Plaintiff-Appellee,	)	La Salle County, Illinois,
	)	
v.	)	Appeal No. 3-11-0680
	)	Circuit No. 08-L-90
LIBBY K. KRISTAL and ILLINOIS	)	
VALLEY EYE INSTITUTE, S.C.,	)	Honorable
	)	R.J. Lannon, Jr.,
Defendants-Appellants.	)	Judge Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justice O'Brien concurred in the judgment.
Justice Schmidt concurred in part and dissented in part.

ORDER

¶ 1 *Held*: Defendants in medical malpractice action were not entitled to judgment notwithstanding the verdict or a new trial where the jury's verdict for plaintiff was not against the manifest weight of the evidence and trial court did not commit prejudicial errors that deprived defendants of a fair trial.

¶ 2 Plaintiff Marvin Rieker filed a medical malpractice action against defendant Libby Kristal and her employer, Illinois Valley Eye Institute. The jury found in favor of plaintiff and awarded him $684,099.41 in damages. Defendants filed a combined motion for judgment notwithstanding the

verdict and a new trial. The trial court denied the motion. We affirm.

¶ 3 On July 16, 2007, defendant Libby Kristal performed cataract surgery on plaintiff Marvin Rieker's right eye. As a result of complications from that surgery, plaintiff lost all vision in his eye and had to have his eye removed. Plaintiff filed suit against Kristal, alleging negligence, and Illinois Valley Eye Institute, alleging vicarious liability.

¶ 4 At trial, plaintiff testified that after Kristal performed cataract surgery on his right eye, he had pain, floaters and tearing. He advised Kristal of this at his appointments with her on July 17, 2007 and July 20, 2007. In the afternoon and evening of July 20, 2007, plaintiff's pain, floaters and tears continued. He slept very little that night and woke up at 4:00 a.m. on July 21, 2007, in "terrific pain." He went to the emergency room at 6:00 a.m. That morning his vision was cloudy and much worse than it had been before. The emergency room staff gave plaintiff an I.V. and contacted Kristal. She was out of town and referred plaintiff to an optometrist, Beth Kunkel.

¶ 5 When plaintiff arrived at Kunkel's office, his vision was "very blurry" and his pain was "terrible." Kunkel performed an eye pressure test, gave him some medicine and sent him home. When plaintiff got home, he did not feel well. Kristal called plaintiff on the evening of July 21, 2007. Plaintiff told Kristal that he was having pain that was 13 on a scale of 1 to 10. He also told Kristal that his vision was blurry and that he "needed her help right now." Kristal told plaintiff she would call him the next morning. Plaintiff's vision worsened during the night of July 21, 2007.

¶ 6 The next afternoon, Kristal called plaintiff and instructed him to meet her at the hospital. Kristal arrived just before 3:00 p.m. Kristal looked at plaintiff's eye and told him he needed to get ready for surgery because he had a severe infection known as endophthalmitis.

¶ 7 Plaintiff spent the night at the hospital. The next morning, he saw Kristal, who told him "I

don't know what to do for you." Plaintiff requested to see another doctor. When another doctor, Kamal Kishore, saw plaintiff's eye, he instructed plaintiff that he needed immediate surgery. Plaintiff underwent surgery to remove bacteria from his eye, but it did not return any vision to plaintiff's eye. After that, plaintiff had surgery to remove his eye and, later, had surgery to insert a prosthetic eye.

¶ 8 Dr. Ramon Inciong testified that he was the emergency room physician at St. Margaret's Hospital on July 21, 2007. When plaintiff came to the emergency room that morning, he complained of "severe pain" in his right eye. After examining plaintiff, Inciong determined that plaintiff needed help from a specialist, Kristal, since she had performed plaintiff's cataract surgery a few days earlier. Inciong contacted Kristal. She advised Inciong to give plaintiff medications to try to reduce the pressure and pain in plaintiff's eye and said she was arranging for plaintiff to be seen by a local optometrist. After that, Kunkel called and instructed Inciong to send plaintiff to her for an evaluation.

¶ 9 Beth Kunkel testified that she is a licensed optometrist, not a medical doctor. On July 21, 2007, Kristal called her and said she was at a conference in Chicago and had a patient at St. Margaret's Hospital that had recently had cataract surgery. She asked Kunkel to see plaintiff to measure plaintiff's eye pressure and check his anterior segment. Kunkel focused her exam on the two procedures Kristal asked her to perform.

¶ 10 Plaintiff was visibly in pain when Kunkel saw him. Kunkel saw evidence of inflammation and swelling of the cornea. She observed a few clumps of white blood cells on the back surface of his cornea, which is a sign of inflammation or infection. When she measured plaintiff's intraocular pressure, the right eye was 48, which is more than double what is should be. She relayed her

findings to Kristal. Kristal advised her to put drops in plaintiff's eye to reduce the pressure and then send him home. Kunkel was not comfortable sending plaintiff home and suggested that he remain at her office. Plaintiff stayed at Kunkle's office, and she measured his pressure an hour later. It was 42 at that time, which is still very elevated. Kunkel believed that when plaintiff left her office he needed to be cared for and treated by an ophthalmologist.

¶ 11 Dr. Catherine Cuite testified that she is an ophthalmologist and oculoplastic surgeon. She first saw plaintiff on August 22, 2007, after he was referred by Kishore. Her examination revealed that plaintiff had no vision in his right eye. She recommended enucleation, which is removal of the eye. On August 31, 2007, plaintiff had an enucleation. An implant was later placed in plaintiff's eye.

¶ 12 Brian Smith testified that he is an ophthalmologist, a physician who specializes in the treatment and diagnosis of eye diseases. Based on his review of the medical records and depositions, he believed to a reasonable degree of medical certainty that Kristal committed medical negligence in her care of plaintiff by (1) not admitting plaintiff to a hospital and personally examining him on July 21, 2007, (2) not providing treatment to plaintiff, other than eye drops for ocular pressure, from the morning of July 21, 2007 to the afternoon of July 22, 2007, (3) sending plaintiff to an optometrist, instead of an ophthalmologist, after he presented to the hospital on July 21, 2007, and (4) not seeing plaintiff until 30 hours after he went to the hospital. Smith further testified that it was his opinion to a reasonable degree of medical certainty that Kristal's acts of negligence contributed to the loss of plaintiff's eye.

¶ 13 Smith believed to a reasonable degree of medical certainty that plaintiff's endophthalmitis on July 21, 2007, could have been treated so that he would not lose his eye. According to Smith, early diagnosis of endophthalmitis is "key." If treated early and managed properly, many patients

preserve vision. He explained that with endophthalmitis, "every hour that goes by the bacteria continue to grow." The bacteria doubles each hour, so it is important to catch the disease early. "The earlier you get it, the earlier you can treat it, the less number of bacteria you're dealing with, the less severe the infection is." When plaintiff first began experiencing pain, the number of bacteria was small but increased exponentially over the next 30 hours. It was his opinion to a reasonable degree of medical certainty that if plaintiff had been properly treated by 12:00 p.m. on July 21, 2007, he would have retained some vision in his eye.

¶ 14 On cross-examination, Smith agreed that his opinions were based on some supposition and estimations because there are no absolute certainties in medicine. He stated that all of his opinions were based on a reasonable degree of medical certainty.

¶ 15 After Smith's testimony, plaintiff rested his case. Thereafter, defendants filed a motion for directed verdict, arguing that plaintiff failed to establish that Kristal's actions and/or inactions were the proximate cause of plaintiff losing his eye. The trial court denied the motion.

¶ 16 Defendant's first witness was Libby Kristal. She testified that she met the standard of care applicable to an ophthalmologist in rendering care to plaintiff. She did not believe that she breached the standard of care by having Kunkel, an optometrist, see plaintiff. She agreed that there were several ophthalmologists in the area on July 21, 2007, but she did not try to reach them because she believed sending plaintiff to Kunkel provided her with the most expeditious way to obtain the information she needed.

¶ 17 She also did not believe that she breached the standard of care in failing to diagnose plaintiff as having endopthalmitis on July 21, 2007, because she thought that plaintiff likely had intraocular pressure due to a lens fragment she had seen in his eye the day before. She admitted that based on

the difficulty of plaintiff's surgery and the rent in his eye, bacteria was more likely to form in plaintiff's eye than in standard cataract surgery patients because "[a] rent in the posterior capsule does allow a small gateway for bacteria."

¶ 18 Dr. Kamal Kishore testified that he is an ophthalmologist and has treated approximately 50 cases of bacterial endophthalmitis in his career. Kristal contacted him on July 23, 2007, because she was concerned that plaintiff had endophthalmitis. When Kishore saw plaintiff, he had no doubt that plaintiff had endophthalmitis. When he met plaintiff, he recommended surgery to clear the infection and make sure it did not spread to plaintiff's brain. Before surgery, he obtained cultures from plaintiff's eye. The culture reports showed that plaintiff had *Streptococcus salivarius* (*Strep salivarius*).

¶ 19 Defense counsel asked Kishore if earlier treatment would have made a difference for plaintiff. Kishore answered, "In general, earlier treatment is associated with better outcome." When asked about "strep salivarius in this case given Mr. Rieker's characteristics," Kishore responded, "*Strep salivarius* is an aggressive – very aggressive bacteria. And lot of times when you are dealing with a very aggressive agent, the outcome is not very good." When defense counsel asked Kishore if he had an opinion whether plaintiff would have had a good or bad outcome, plaintiff's attorney objected, arguing that the question had already been asked and answered. The trial court sustained the objection. Defense counsel then asked Kishore if he had an opinion as to what plaintiff's outcome would have been had he received treatment on Saturday. Plaintiff's counsel again objected, arguing that the question was asked and answered. The trial court sustained the objection.

¶ 20 On cross-examination, Kishore agreed that prompt treatment is necessary for endophthalmitis because infections inside the eye can destroy retinal tissue rapidly. He said, "the sooner you treat,

the more likely you will have the possibility of a better outcome." It was too late to treat plaintiff's condition two to three days after the first symptoms of endophthalmitis appeared.

¶ 21 On redirect, defense attorney attempted to refresh Kishore's memory of statements he made at his deposition regarding whether plaintiff would have a good outcome if treated sooner. Plaintiff's attorney objected, arguing it was beyond the scope of his cross-examination and should have been addressed on direct examination. The trial court sustained the objection. Defense counsel then made an offer of proof in which he read Kishore's deposition testimony, stating that plaintiff would have had a bad outcome no matter what.

¶ 22 Dr. William Smiddy testified that he is an ophthalmologist and has studied endophthalmitis. His study was confined to studying *Streptococcus pneumoniae (Strep pneumoniae)*, which he testified was a related cousin to *Strep salivarius*. Defense counsel asked which was worse, *Strep pneumoniae* or *Strep salivarius*. Plaintiff's counsel objected, arguing that such an opinion was not disclosed in Smiddy's deposition. The trial court asked, "Is it in the deposition? I did not see it." Defense counsel responded, "No. It is certainly a natural corollary." The trial court sustained the objection. When defense counsel then asked Smiddy about the results of his study on *Strep pneumoniae*, Smiddy testified that the results of his study on *Strep pneumoniae* revealed that the majority of patients retained little or no vision in the eye even if they received prompt treatment.

¶ 23 Smiddy opined to a reasonable degree of medical certainty that Kristal complied with the standard of care. Specifically, he found that Kristal did not breach the standard of care by failing to diagnose endophtalmitis on July 21, 2007, or referring plaintiff to an optometrist on July 21, 2007. He further opined, based on a reasonable degree of medical certainty, that treatment rendered to plaintiff prior to noon on July 21, 2007, would not have helped salvage the vision in plaintiff's eye.

He explained that strep bacteria in the eye is "one of the worst organisms that we can have" because the body is not able to quickly get rid of it.

¶ 24 After Smiddy's testimony, the defense rested, and a jury instruction conference was held. At the conference, plaintiff tendered an issues instruction, which the trial court modified extensively, striking several paragraphs and requiring plaintiff to change much of the language. The end result was plaintiff's instruction 9-A, which stated:

> "The plaintiff further claims that one or more of the foregoing was a proximate cause of the Plaintiff, Marvin Rieker's, injuries.
>
> (a) Failed to provide the Plaintiff, Marvin Rieker, with postoperative care and medical treatment.
>
> (b) Failed to refer the Plaintiff to a qualified ophthalmologist after he was released by the optometrist.
>
> (c) Failed to direct the E.R. Physician to admit the Plaintiff to the hospital for consultation with an ophthalmologist or retinal surgeon.
>
> (d) Asked the E.R. Physician to send the Plaintiff from the Emergency Room to an optometrist, a non-medical doctor, for an assessment of the Plaintiff's condition.
>
> (e) Failed to provide the Plaintiff with any medical treatment from 12:00 noon on July 21, 2007 through 3:00 p.m. July 22, 2007, except for the continuous use of eye drops for ocular pressure reduction.
>
> The Plaintiff further claims that one or more of the foregoing was a proximate cause of the Plaintiff, Marvin Rieker's, injuries.

> The Defendants, Libby Kristal, M.D. and Illinois Valley Eye Institute, S.C., deny that they did any of the things claimed by the Plaintiff; deny that they were negligent in doing any of the things claimed by the Plaintiff; and deny that any claimed act and/or omission on the part of the Defendants was a proximate cause of the Plaintiff's claimed injuries."

¶ 25 The trial court also agreed to give Defendant's Instruction No. 11 to the jury, which stated in pertinent part: " 'Professional Negligence' by an ophthalmologist is the failure to do something that a reasonably careful ophthalmologist would do, or the doing of something that a reasonably careful ophthalmologist would not do, under circumstances similar to those shown by the evidence."

¶ 26 Defendant requested that the following special interrogatory be given to the jury: "Was the type of bacteria in Marvin Rieker's right eye the sole proximate cause of the injury that he suffered." Plaintiff objected, and the trial court refused to give the interrogatory, finding that it would confuse the jury.

¶ 27 In his closing argument, plaintiff's counsel stated: "[I]f you return a verdict in favor of the defendant in this case, what you are saying is to everyone that you approve of the kind of treatment that the–." Defense counsel objected, and the trial court sustained the objection. Plaintiff's counsel then said, "[I]f you return a verdict for Dr. Kristal, I don't know what else you would be saying except –" Defense counsel objected, and the trial court overruled the objection. Plaintiff's counsel then continued: "You are saying that what you heard in evidence in this case is not negligence. That's what you would be saying" told the jury: "[I]f you return a verdict for Dr. Kristal *** [y]ou are saying that what you heard in this case is not negligence."

¶ 28 The jury found in favor of plaintiff and awarded him $684,099.41. Defendants then filed a

combined motion for judgment notwithstanding the verdict and a new trial, arguing that plaintiff failed to establish that Kristal proximately caused plaintiff's injury and that cumulative errors denied them a fair trial. The trial court denied the motion.

¶ 29 I. Judgment Notwithstanding the Verdict

¶ 30 Defendants argue that they are entitled to a judgment notwithstanding the verdict because plaintiff failed to prove that Kristal proximately caused his injuries.

¶ 31 A judgment notwithstanding the verdict should be granted only when all the evidence, viewed in a light most favorable to the nonmovant so overwhelmingly favors the movement that no contrary verdict could stand based on the evidence. *Bergman v. Kelsey*, 375 Ill. App. 3d 612, 621 (2007). A trial court cannot reweigh the evidence and set aside a verdict merely because the jury could have drawn different inferences or conclusions, or because the court feels that other results are more reasonable. *Maple v. Gustafson*, 151 Ill. 2d 445, 452-53 (1992).

¶ 32 Likewise, an appellate court should not usurp the function of the jury and substitute its judgment on questions of fact fairly submitted tried, and determined from the evidence which did not greatly preponderate either way. *Id*. The standard for obtaining a judgment notwithstanding the verdict is very difficult to meet and is limited to extreme situations only. *Bergman*, 375 Ill. App. 3d at 621-22. We review *de novo* the trial court's decision denying plaintiff's motion for judgment notwithstanding the verdict. *Baley v. Federal Signal Corp.*, 2012 IL App (1st) 093312, ¶ 52.

¶ 33 In a medical malpractice action, the plaintiff must prove that the defendant's breach of the applicable standard of care proximately caused the resulting injury. *Robinson v. Boffa*, 402 Ill. App. 3d 401, 403 (2010). Proximate cause must be established by expert testimony to a reasonable degree of medical certainty. *Walton v. Dirkes*, 388 Ill. App. 3d 58, 60 (2009). While an expert may not

guess, conjecture, or surmise as to a possible cause of the injury, he can testify in terms of possibilities or probabilities as long as the opinion is based on a reasonable degree of medical certainty. *Dupree on Behalf of Estate of Hunter v. County of Cook*, 287 Ill. App. 3d 135, 143 (1997). Proximate cause may be established by evidence that the defendant's negligent conduct "increased the risk of harm" to the patient or "lessened the effectiveness" of the patient's treatment. *Walton*, 388 Ill. App. 3d at 60, quoting *Holton v. Memorial Hospital*, 176 Ill. 2d 95, 104-05 (1997). A plaintiff is not required to show in absolute terms that a different outcome would have occurred, as such certainty is never possible. *Wodziak v. Kash*, 278 Ill. App. 3d 901, 911-12 (1996).

¶ 34 Proximate cause is ordinarily an issue of fact for the jury to decide unless the facts are undisputed and reasonable minds could not differ as to the inferences to be drawn from those facts. *Robinson*, 402 Ill. App. 3d at 403. Where a plaintiff offers testimony to a reasonable degree of medical certainty that defendant's negligence resulted in a delayed diagnosis and lessened the effectiveness of medical treatment, the issue of proximate cause should go to the jury. See *Walton*, 388 Ill. App. 3d at 67. Where there is conflicting testimony about proximate cause, the credibility and weight of the conflicting witnesses' opinions are for the jury. *Id.* at 68.

¶ 35 Here, plaintiff's expert, Smith, provided a sufficient causal connection between Kristal's failure to timely diagnose and treat plaintiff's endophthalmitis and the loss of plaintiff's eye. Smith testified to a reasonable degree of medical certainty that Kristal breached the standard of care in a number of ways and that it was his opinion to a reasonable degree of medical certainty that Kristal's breaches contributed to the loss of plaintiff's eye.

¶ 36 Although defendants' expert testified that Kristal could not have done anything to save plaintiff's eye, Smith provided testimony to the contrary. Smith admitted that his testimony was

based on some supposition and estimations but stated that all of his opinions were based on a reasonable degree of medical certainty, which is all that is required of an expert in a medical negligence action. See *Dupree*, 287 Ill. App. 3d at 143. Because there was conflicting testimony about proximate cause, the trial court properly allowed the jury to decide the issue. See *Robinson*, 402 Ill. App. 3d at 403; *Walton*, 388 Ill. App. 3d 68. The trial court did not err in denying defendants' motion for judgment notwithstanding the verdict.

¶ 37 II. New Trial

¶ 38 Defendants argue that the trial court should have granted their motion for a new trial because (1) the jury's finding of proximate cause was against the manifest weight of the evidence, and (2) the trial court committed many errors that prejudiced them and denied them a fair trial.

¶ 39 The standard to be used in determining whether to grant a new trial is whether (1) the jury's verdict was against the manifest weight of the evidence, or (2) serious and prejudicial errors were made at trial in the exclusion or admission of evidence. *Favia v. Ford Motor Co.*, 381 Ill. App. 3d 809, 815-16 (2008). The purpose of a motion for a new trial is to give the trial court an opportunity to correct any error it made at trial. *Gersch v. Kelso-Burnett Co.*, 272 Ill. App. 3d 907, 908 (1995). Jury verdicts should not be set aside and cause the expense of a new trial unless there has been a miscarriage of justice, caused by an error that prejudiced and affected the substantial rights of an innocent party. *Id.*

¶ 40 A reviewing court will not reverse a trial court's decision denying a new trial unless it is shown to be an abuse of discretion. *Gersch*, 272 Ill. App. 3d at 908. An abuse of discretion occurs when the ruling is arbitrary, fanciful, unreasonable, or when no reasonable person would take the same view. *Favia*, 381 Ill. App. 3d at 815.

¶ 41 A. Proximate Cause

¶ 42 Defendants first argue that the trial court should have granted them a new trial because the jury's determination that defendants proximately caused plaintiff's injury was against the manifest weight of the evidence.

¶ 43 A new trial should be granted only when the verdict is contrary to the manifest weight of the evidence. *Bergman*, 375 Ill. App. 3d at 629. A 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*. Credibility determinations and the resolution of inconsistencies and conflicts in testimony are for the jury. *Id.*

¶ 44 As set forth above, there was conflicting expert testimony regarding proximate cause in this case. As such, that issue was properly left for the jury to decide. See *Bergman*, 375 Ill. App. 3d at 629. Because Smith provided testimony supporting the jury's verdict, defendants are not entitled to a new trial on that basis.

¶ 45 B. Kishore's Testimony

¶ 46 Defendants next argue that they are entitled to a new trial because the trial court improperly denied them the right to impeach Kishore with his deposition testimony.

¶ 47 The credibility of a witness may be attacked by any party, including the party calling the witness. Ill. S. Ct. R. 238 (eff. April 11, 2011). It is appropriate to test the credibility of a witness by demonstrating that on a prior occasion the witness made statements inconsistent with his trial testimony. *Smith v. Silver Cross Hospital*, 339 Ill. App. 3d 67, 81 (2003). To be used for impeachment, a witness' prior statement must be materially inconsistent with his trial testimony. *Id*. at 82. For deposition testimony to be admissible for impeachment, that testimony must contradict

an in-court statement of the witness on a material matter. *Id*. Before any impeachment can occur, the witness first must testify at trial in a manner inconsistent with his prior out-of-court testimony. *Id*.

¶ 48 When a trial court improperly excludes testimony, reversal is not warranted if the proposed testimony is cumulative of other testimony admitted at trial. *Perez v. Hartmann*, 187 Ill. App. 3d 1098, 1109 (1989). The exclusion of cumulative testimony is harmless and not prejudicial to the proponent. See *Holston v. Sisters of Third Order of St. Francis*, 165 Ill. 2d 150, 170 (1995); *Hulman v. Evanston Hospital Corp.*, 259 Ill. App. 3d 133, 148 (1994).

¶ 49 Here, during direct examination, defense counsel asked Kishore about "*Strep salivarius* in this case given [plaintiff's] characteristics." Kishore responded that *Strep salivarius* is a "very aggressive bacteria" and that a lot of times the outcome with *Strep salivarius* is "not very good." Defense counsel then asked Kishore about the effect of the bacteria on plaintiff. Plaintiff objected, arguing that question had already been answered. The trial court sustained plaintiff's objection. Thereafter, on redirect examination, defense counsel sought to impeach Kishore with his deposition testimony that plaintiff would have had a bad outcome no matter when he was treated. Plaintiff's attorney objected, arguing it was beyond the scope and should have been addressed on direct examination. The trial court sustained the objection.

¶ 50 We find that the trial court committed no error in this case. On direct examination, defense counsel questioned Kishore about "*Strep salivarius* in this case." Kishore responded by saying that the outcome with *Strep salivarius* is often "not very good." This testimony was not inconsistent with Kishore's deposition testimony that plaintiff would have had a bad outcome no matter what. Because there was no inconsistency, defense counsel could not have impeached Kishore with his prior

statement. See *Smith*, 339 Ill. App. 3d at 82.

¶ 51 Defendants contend that they were prevented from obtaining inconsistent testimony from Kishore because the trial court did not allow defense counsel to ask Kishore if he had an opinion about whether plaintiff's outcome would have been good or bad. When defense counsel attempted to ask that question, the trial court sustained plaintiff's objection because it was "asked and answered." The trial court did not abuse its discretion when it sustained plaintiff's objection on that basis since defense counsel already asked Kishore what he thought about "strep salivarius in this case given [plaintiff's] characteristics."

¶ 52 Even if the trial court erred by prohibiting Kishore from giving his opinion about whether plaintiff's outcome would have been good or bad, any such error was not so prejudicial that it affected defendants' right to a fair trial. Defense counsel had already elicited testimony from Kishore that "a lot of times" the outcome with *Strep salivarius* "is not very good." Additionally, defendants' expert, Smiddy, testified that even if plaintiff received proper, timely treatment, he still would have lost his eye. Kishore's testimony that plaintiff's outcome would have been "bad no matter what" would have been cumulative to his own testimony, as well as Smiddy's testimony. Because Kishore's testimony would have been cumulative to testimony already provided, the preclusion of such testimony did not prejudice defendants. See *Holston*, 165 Ill. 2d at 170; *Hulman*, 259 Ill. App. 3d at 148.

¶ 53 C. Smiddy's Testimony

¶ 54 Next, defendants argue that the trial court erred in preventing Smiddy from testifying that *Strep salivarius* is worse that *strep pneumoniae*.

¶ 55 Illinois Supreme Court Rule 213(g) sets forth the limitations for testimony that can be given

at trial. Ill. S. Ct. R. 213(g) (eff. Jan. 1, 2007). That rule provides:

> "The information disclosed in an answer to a Rule 213(f) interrogatory, or in a discovery deposition, limits the testimony that can be given by a witness on direct examination. Information disclosed in a discovery deposition need not be specifically identified in a Rule 213(f) answer, but upon objection at trial, the burden is on the proponent of the witness to prove the information was provided in a Rule 213(f) answer or in the discovery deposition." Ill. S. Ct. R. 213(g) (eff. Jan. 1, 2007).

¶ 56 Here, in their Rule 213(f) answer, defendants identified Smiddy as an expert witness and indicated that he would testify at trial that (1) Kristal met the standard of care in treating plaintiff before and after July 21, 2007; (2) even if treatment had been rendered immediately to plaintiff, the treatment would likely not have saved plaintiff's vision; and (3) he disagreed with Smith's opinions regarding standard of care, breach of the standard of care and causation. Defendants did not disclose in their Rule 213(f) answer that Smiddy would be opining that *Strep salivarius* is worse than *Strep pneumoniae*.

¶ 57 At trial, when defense counsel asked Smiddy whether *Strep salivarius* or *Strep pneumoniae* was worse, plaintiff's counsel objected, arguing that such an opinion had not be disclosed by Smiddy. When the trial court asked defense counsel if Smiddy had disclosed the opinion at his deposition, defense counsel responded, "No."

¶ 58 Under these circumstances, the trial court did not err in precluding Smiddy from testifying that *Strep salivarius* is worse than *Strep pneumoniae*. Upon plaintiff's objection, it was defendants' burden to show that Smiddy's opinion was provided in their Rule 213(f) answer or at Smiddy's discovery deposition. See S. Ct. R. 213(f) (eff. Jan. 1, 2007). Defendants failed to meet their burden

because their Rule 213(f) answers did not disclose such an opinion, and when asked if the opinion was disclosed at Smiddy's deposition, defense counsel answered, "No." Because defendants failed to meet their burden of proving that the opinion was previously disclosed to plaintiff, the trial court properly excluded it.

¶ 59 Defendants now contend that Smiddy did testify at his deposition that *Strep pneumoniae* and other strep bacterias are "not as bad as the *Streptococcus salivarius*." However, this does not change our opinion that the trial court did not err because it was at trial, not on appeal, that defendants had the burden of showing that the opinion was contained in Smiddy's deposition. See S. Ct. R. 213(f) (eff. Jan. 1, 2007). Because defendants failed to do so, the trial court properly sustained plaintiff's objection to the opinion.

¶ 60 Moreover, even if the trial court erred in precluding the opinion, we find that it was not prejudicial. During his testimony, Smiddy was allowed to testify that (1) *Strep salivarius* and *Strep pneumoniae* are close cousins, (2) the results of his study on *Strep pneumoniae* revealed that the majority of patients retained little or no vision in the eye even if they received prompt treatment, and (3) strep bacteria in the eye is "one of the worst organisms that we can have" because the body is not able to quickly get rid of it. Because all of this testimony was before the jury, Smiddy's additional opinion that *Strep salivarius* is worse than *Strep pneumoniae* would not have changed the result of the trial.

¶ 61 D. Special Interrogatory

¶ 62 Defendants next contend that the trial court erred in refusing their special interrogatory asking if the bacteria in plaintiff's eye was the sole proximate cause of his injuries.

¶ 63 A trial court must provide a special interrogatory that it is proper in form. *Thomas v.*

Johnson Controls, Inc., 344 Ill. App. 3d 1026, 1033 (2003). However, a trial court has discretion to refuse to submit a special interrogatory to the jury that is not in proper form. *Curatola v. Village of Niles*, 324 Ill. App. 3d 954, 960 (2001). To be in proper form, a special interrogatory should consist of a single, direct question, should not be repetitive, misleading, confusing or ambiguous and should use the same language that the jury instructions contain. *Id*. In addition, it should relate to an ultimate question of fact upon which the rights of the parties depend, and an answer responsive to it must be inconsistent with a general verdict. *Id*.

¶ 64 In *Carillo v. Ford Motor Co.*, 325 Ill. App. 3d 955, 968-69 (2001), the appellate court ruled that the trial court properly refused to give a special interrogatory asking if the negligence of another driver was "the sole proximate cause of the injuries to [the plaintiff]" in plaintiff's products liability action against the maker of her automobile. The court explained that the only question at issue in that case was "whether the Ford Explorer seat was unreasonably dangerous." *Id*. at 968. The other driver's negligence was not at issue at trial because the parties conceded it. *Id*. The court explained: "Because [the other driver's] negligence was not at issue, the jury was required to make only one proximate cause finding - whether the alleged design defect in the Ford Explorer seat was a proximate cause of [the plaintiff's] injuries." *Id*. at 969. Thus, the trial court found that the defendant's interrogatory asking if the other driver was "the sole proximate cause" of plaintiff's injuries was improper and "could have confused the jury." *Id*.

¶ 65 Here, defendants asked the trial court to submit the following interrogatory to the jury: "Was the type of bacteria in Marvin Rieker's right eye the sole proximate cause of the injury that he suffered." However, the presence of the bacteria was not at issue in this case because the parties conceded that plaintiff had bacteria in his right eye. Because the bacteria in plaintiff's eye was not

at issue, the jury was required to make only one proximate cause finding - whether defendants' treatment or lack thereof was a proximate cause of plaintiff's injuries. To submit defendants' interrogatory, asking if the bacteria was the "sole proximate" cause of plaintiff's injuries would have been improper and could have confused the jury. See *Carillo*, 325 Ill. App. 3d 969. Thus, the trial court did not err in refusing defendants' special interrogatory.

¶ 66 E. Plaintiff's Instruction 9-A

¶ 67 Next, defendants contend that the trial court erred in giving Plaintiff's Jury Instruction 9-A because it "overemphasized plaintiff's negligence theories."

¶ 68 The decision to give or refuse a jury instruction is within the trial court's discretion. *Hudson v. City of Chicago*, 378 Ill. App. 3d 373, 403 (2007). The standard for determining whether the trial court abused its discretion is whether, taken as a whole, the instructions fully, fairly and comprehensively informed the jury of the relevant legal principles. *Id*. A judgment will not be reversed where jury instructions are faulty unless they mislead the jury and the complaining party suffered prejudice. *Id*.

¶ 69 Each party has the right to have the jury clearly and fairly instructed upon each theory which is supported by the evidence. *McCarthy v. Kunicki*, 355 Ill. App. 3d 957, 970 (2005). Pattern instructions are presumed to be accurate statements of Illinois law. *Lange v. Freund*, 367 Ill. App. 3d 641, 644-45 (2006). The jury is to be instructed using an approved pattern form if the trial court determines that it is applicable to the circumstances of the case. *Id*. When a pattern jury instruction is applicable, it "shall be used, unless the court determines that it does not accurately state the law." Ill. S. Ct. R. 239(a) (eff. Jan. 1, 2011).

¶ 70 Plaintiff's Instruction 9-A uses the general pattern form set forth in Illinois Pattern Jury

Instructions, Civil, No. 20.01 (2011) (hereinafter IPI Civil (2011) No. 20.01). The rule applicable to this instruction is that the "court should inform the jury in a clear and concise manner of the issues raised by the pleadings." *Truemper v. Bowman*, 17 Ill. App. 3d 677, 680 (1974). This is accomplished by a summary of the pleadings succinctly stated without repetition or undue influence. *Id*.

¶ 71 Here, Plaintiff's Instruction 9-A lists five allegedly negligent acts performed by Kristal that were set forth in plaintiff's complaint and supported by Smith's testimony at trial. The instruction conforms to IPI Civil (2011) No. 20.01 and was properly given.

¶ 72 F. Plaintiff's Closing Argument

¶ 73 Defendants next argue that plaintiff's closing argument was an attempt at jury nullification and, therefore, deprived them of a fair trial.

¶ 74 Attorneys are afforded wide latitude in making closing arguments so long as the comments are based on the evidence or reasonable inferences drawn therefrom. *Zickurh v. Ericsson, Inc.*, 2011 IL App (1st) 103430, ¶ 72. Improper comments by counsel constitute reversible error only where they are so prejudicial as to deprive the other party of the right to a fair trial. *Id.* at ¶ 73. Generally, when an improper statement is made, if the trial court sustains a timely objection, the court sufficiently cures any prejudice." *Id*. at ¶ 75.

¶ 75 Jury nullification occurs when an attorney argues that jurors should ignore the law in coming to a decision. See *People v. Woods*, 2011 IL App (1st) 092908, ¶ 34. While counsel may not argue that jurors should ignore the law, he may attempt to evoke the empathy, compassion, understanding and sympathy of the jurors. *Id.*

¶ 76 Here, during closing argument, plaintiff's attorney stated, "[I]f you return a verdict in favor

of the defendant in this case, what you are saying is to everyone that you approve of the kind of treatment that the–." Defense counsel objected, and the trial court sustained the objection. Plaintiff's counsel then said, "[I]f you return a verdict for Dr. Kristal, I don't know what else you would be saying except –" Defense counsel objected, and the trial court overruled the objection. Plaintiff's counsel then continued: "You are saying that what you heard in evidence in this case is not negligence. That's what you would be saying"

¶ 77 Nothing in the above statements suggests that plaintiff's counsel was instructing the jury to ignore the law. While the first statement was somewhat intended to appeal to the jurors' sympathies and did not contain a legal term of art, the trial court sustained defense counsel's objection to it. Therefore, any prejudice it may have caused was cured. See *Zickuhr*, 2011 IL App (1st) 103430, ¶ 75. Plaintiff's counsel's next statement was proper as it stated the law and asked the jury to decide if Kristal's actions constituted negligence. Under these circumstances, plaintiff's closing argument was not improper or prejudicial to defendants.

¶ 78 G. Defendants' Instruction No. 11

¶ 79 Defendants argue next that they are entitled to a new trial because Defendant's Instruction No. 11 was not an accurate statement of Illinois law.

¶ 80 If an instruction does not accurately state the law, the trial court errs in giving the instruction to the jury. *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶ 28. However, reversal is warranted only if the error resulted in "serious prejudice" to the defendant's right to a fair trial. *Id*.

¶ 81 "A party forfeits the right to challenge a jury instruction that was given at trial unless it makes a timely and specific objection to the instruction and tenders an alternative, remedial instruction to the trial court." *Studt*, 2011 IL 108182, ¶ 19. Here, not only did defendants not object to the

proposed jury instruction, they offered the instruction. Thus, they forfeited the right to challenge it.

¶ 82 If defendants had not forfeited their right to challenge the court's issuance of Defendants' Instruction No. 11, their argument would still fail. Defendants' Instruction No. 11 was in the form of Illinois Pattern Jury Instructions, Civil, No. 105.01 (2011) (hereinafter IPI Civil (2011) No. 105.01). Since it was a pattern jury instruction, it was presumed to accurately state the law, and the trial court was required to give it. See *Lange*, 367 Ill. App. 3d at 644-45; Ill. S. Ct. R. 239(a) (eff. Jan. 1, 1999).

¶ 83 Nevertheless, defendants argue that the trial court erred in giving the instruction because the supreme court in *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶ 34, found that IPI Civil (2011) No. 105.01 does not accurately state Illinois law in that it lacks reference to a professional's "knowledge, skill and care." However, the supreme court in *Studt* also held that reversal was not warranted because the incompleteness of the instruction did not result in "serious prejudice" to the defendant since the plaintiff's expert testified extensively about how the defendant's conduct violated the standard of care. *Id.* at ¶ 34.

¶ 84 Likewise, in this case, even if the instruction did not accurately state Illinois law, reversal is not warranted because the instruction did not seriously prejudice defendants' right to a fair trial. See *Studt*, 2011 IL 108182, at ¶ 34. Smith thoroughly explained how Kristal violated the standard of care by failing to act as a physician with the same degree of knowledge, skill and ability would act under similar circumstances. Therefore, the jury was adequately informed, even if not formally instructed, that defendants were required to use the same degree of knowledge, skill and ability normally possessed by physicians under similar circumstances. See *Studt*, 2011 IL 108182, at ¶ 34. Since any error in the instruction did not cause "serious prejudice" to defendants, they are not entitled

to a new trial on that basis. See *Studt*, 2011 IL 108182, at ¶ 28.

¶ 85 H. Cumulative Errors

¶ 86 Finally, defendants contend that the cumulative errors that allegedly occurred in this case deprived them of a fair trial.

¶ 87 No litigant is assured a perfect trial, but a litigant must not be denied a fair trial. *Andes v. Lauer*, 80 Ill. App. 3d 411, 416 (1980). While individual errors standing alone may not be sufficient to require a new trial, cumulative errors may be so prejudicial as to justify a new trial. *Id*. The cumulative errors doctrine does not apply where the few errors that occurred at trial did not prejudice the defendant. See *Cretton v. Protestant Memorial Medical Center*, *Inc.*, 371 Ill. App. 3d 841, 863-64 (2007); *Bachman v. General Motors Corp.*, 332 Ill. App. 3d 760, 806 (2002).

¶ 88 As set forth above, we have found no prejudicial errors by the trial court. In the absence of any prejudicial errors, the cumulative error doctrine does not apply. See *Cretton*, 371 Ill. App. 3d at 863-64; *Bachman*, 332 Ill. App. 3d at 806.

¶ 89 The order of the circuit court of La Salle County is affirmed.

¶ 90 Affirmed.

¶ 91 JUSTICE SCHMIDT, dissenting in part and concurring in part.

¶ 92 I concur in the majority's assessment that defendants are not entitled to a judgment notwithstanding the verdict. However, I find the trial court: (1) improperly prohibited defendants from impeaching Dr. Kishore; (2) improperly allowed plaintiff's counsel to invite the jury to engage in instruction nullification during closing arguments; and (3) erred when refusing defendants' proposed special interrogatory. Therefore, I respectfully dissent from the majority's conclusion to the contrary. These errors, individually and collectively, denied defendants a fair

trial. I would reverse and remand for a new trial.

¶ 93 A. Impeachment of Dr. Kishore

¶ 94 The majority concludes that no error was committed when the trial court sustained plaintiff's objections while defense counsel questioned Dr. Kishore regarding s*trep salivarius*. *Supra*, ¶ 50. In doing so, the majority finds Dr. Kishore's trial testimony consistent with his deposition testimony concluding that, even if prohibiting further inquiry was error, it amounted to harmless error as such inquiry could have, at best, produced cumulative testimony given the opinions of the defendants' captive expert. *Supra*, ¶ 50. I disagree.

¶ 95 During his deposition, Dr. Kishore stated that "the patients who have endophthalmitis caused by this particular bacteria [*streptococcus salivarius*] do very poorly. In fact, I'm not aware of any case ever in the world where a patient had infection caused by this organism and the eye could be saved. So just that he had bad luck, happened to have a bad bacteria causing infection."

¶ 96 During trial, on Dr. Kishore's direct examination by defense counsel, the following exchange took place:

> "Q: Dr. Kishore, based upon your training, education, and experience as a retina specialist, do you have an opinion given everything that is known in hindsight, the type of bacteria, what you know about Mr. Rieker, do you have an opinion as to whether earlier treatment on or about 10:30 a.m. on Saturday morning would have made a difference in the course and outcome? Do you have an opinion?
>
> A: In general, earlier treatment is associated with better

outcome.

* * *

Q: What about *strep salivarius* in this case given Mr. Rieker's characteristics?

A: *Strep salivarius* is an aggressive – – very aggressive bacteria. And lot of times when you are dealing with a very aggressive agent, the outcome is not very good.

Q: Do you have an opinion whether Mr. Rieker would have had a good or bad outcome in this case given – –

MR. RACCUGLIA [plaintiff's counsel]: Asked and answered.

Q: – – given that – –

MR. RACCUGLIA: Asked and answered.

THE COURT: Sustained.

Q: What about Mr. Rieker's diabetes? Where does that play into it?

A: Diabetes also puts a person at a high risk for worse outcome compared to somebody who does not have diabetes.

Q: Okay. So do you have any opinion as to what his outcome would have been had he received treatment on Saturday?

MR. RACCUGLIA: Your Honor, it has been asked and answered.

THE COURT: Sustained.

MR. PRETORIUS [defense counsel]: Your Honor, I don't think we have gotten the answer.

THE COURT: I believe you did, counsel."

¶ 97 Clearly, Dr. Kishore never answered defense counsel's question. As noted above, defense counsel asked if given "the type of bacteria, *** earlier treatment on or about 10:30 a.m. on Saturday morning would have made a difference in the course of the outcome?" Dr. Kishore's equivocating "earlier treatment is generally better" is, at best, nonresponsive. Moreover, the answer undoubtedly conflicts with his deposition testimony in which he unequivocally stated that "patients who have endophthalmitis caused by this particular bacteria [*streptococcus salivarius*] do very poorly. In fact, I'm not aware of any case ever in the world where a patient had infection caused by this organism and the eye could be saved." Kishore's deposition answer was absolute containing no correlation between a patient's prognosis once infected with *strep salivarius* and the initiation of treatment.

¶ 98 The majority finds that Kishore's trial testimony is "not inconsistent" with the answer given during his deposition. *Supra*, ¶ 50. I disagree. The trial court erred when prohibiting defense counsel from impeaching Kishore with his previous testimony.

¶ 99 Moreover, I do not find the error to be harmless as the majority does. *Supra*, ¶ 52. The majority states that had Kishore testified consistent with his deposition testimony, such evidence would have merely been cumulative since the defendants' retained expert, Dr. Smiddy, "testified that even if plaintiff received proper, timely treatment, he still would have lost the eye." *Supra*, ¶ 52. Therefore, the majority concludes that since "Kishore's testimony would have been

cumulative to *testimony already provided*, the preclusion of such testimony did not prejudice defendants." (Emphasis added.) *Supra*, ¶ 52.

¶ 100 My review of the record indicates that defendants called Dr. Kishore to testify on May 25, 2011, and, on that day, the trial court prohibited defendants' impeachment of him. The defendants did not call Dr. Smiddy to testify until the next day, May 26, 2011. This fact, in and of itself, renders the majority's assessment incorrect that "testimony already provided" to the jury by Smiddy rendered Kishore's impeachment cumulative.

¶ 101 More importantly, prohibiting the jury from hearing Dr. Kishore's deposition testimony that as a retinal specialist, he was unaware of even a single case, anywhere in the world, where an eye was saved after being infected with this particular bacteria, definitely prejudiced defendants. One cannot deny the practical influence of this testimony coming from plaintiff's treating physician versus a captive expert. As our supreme court recognizes, "Evidence is considered cumulative when it adds nothing to what was already before the jury." *People v. Ortiz*, 235 Ill. 2d 319, 335 (2009). It denies reality to suggest that testimony from plaintiff's subsequent treating physician adds nothing to what is already before the jury simply due to the fact that it is similar to the testimony of defendants' retained expert in a medical malpractice case. Therefore, I disagree with the majority's conclusion that Kishore's deposition testimony would merely have been cumulative evidence rendering its prohibition harmless error.

¶ 102 During the cross-examination of Dr. Kishore, plaintiff's counsel asked a number of questions regarding how important "prompt treatment is *** in endophthalmitis" cases. Counsel obtained an answer from Dr. Kishore emphasizing the need "to be treated right away to have a good chance of a decent outcome" since "infections inside the eye *** can destroy delicate retinal

tissue rapidly." Plaintiff's counsel asked Dr. Kishore how many of his own patients ever suffered from endophthalmitis, tying in additional questions highlighting Kishore's testimony "that prompt treatment is important in endophthalmitis."

¶ 103 On redirect, defense counsel's very first question asked, "Dr. Kishore, back to this opinion about earlier treatment, I want to read some questions and answers to you and see if they refresh your recollection." Plaintiff's counsel objected, claiming the question was "beyond the scope." The trial court sustained the objection. During a discussion out of the presence of the jury, the trial court admitted Dr. Kishore's answers, regarding earlier treatment equates to a better outcome, "surprised me after having read his deposition ***." The trial court further acknowledged that Dr. Kishore "did indicate that it would be a bad result probably, but he was not as strong as he was in his deposition." Nevertheless, the trial court refused to allow defense counsel to impeach Dr. Kishore with his previously inconsistent deposition testimony in which he unequivocally stated he has never seen an eye saved once this bacteria invades it.

¶ 104 This was clearly error. During cross-examination, plaintiff's counsel questioned Dr. Kishore regarding the previously unstated "earlier treatment is better" opinion. This opinion is not only inconsistent with prior statements made by Dr. Kishore, but ties closely into both party's theory of causation: the plaintiff's theory that lack or delay in treatment caused plaintiff to lose his eye and the defense theory that it was the specific strain of bacteria that determined the outcome. These errors denied defendants the right to put forth evidence crucial to their theory.

¶ 105 Finally, plaintiff's counsel argues that allowing impeachment of Dr. Kishore on redirect would impermissibly have precluded him from asking additional questions on the subject since he has no right to recross-examine a witness. Counsel is more than aware, however, that the

"scope and extent of cross-examination and re-cross-examination are within the discretion of the trial court" and that he certainly could have requested the opportunity to recross-examine Dr. Kishore. *Cetera v. DiFilippo*, 404 Ill. App. 3d 20, 46 (2010). However, plaintiff's argument in this regard is based upon the premise that the redirect would have been beyond the scope of the cross. As illustrated above, that premise if false. The trial court, again, erroneously sustained plaintiff's objection to this important evidence.

¶ 106 B. Closing Argument

¶ 107 Furthermore, I disagree with the majority's assertion the trial court cured "any prejudice it may have caused" by allowing plaintiff's counsel to tell the jury the purpose of its verdict is to send a message "to everyone." *Supra*, ¶ 77. The record indicates the following exchange took place during plaintiff's closing:

> "But you have to remember, folks, if you return a verdict in favor of the defendant in this case, what you are saying is to everyone that you approve of the kind of treatment that the – –
>
> MR. PRETORIUS [defense counsel]: Objection.
>
> THE COURT: I sustain that objection.
>
> MR. RACCUGLIA [plaintiff's counsel]: Well, if you return a verdict for Dr. Kristal, I don't know what else you would be saying except – –
>
> MR. PRETORIUS: Objection.
>
> MR. RACCUGLIA: Your Honor, I have a right to say what the verdict result is, don't I?

THE COURT: I will overrule that objection.

MR. RACCUGLIA: You are saying that what you heard in evidence in this case is not negligence. That's what you would be saying."

¶ 108 The majority acknowledges that plaintiff's counsel's statements were intended to appeal to the jurors' sympathies yet claims, citing to *Zickuhr*, any prejudice the statements caused were cured when the trial court sustained defendants' objection. *Supra*, ¶ 77. The *Zickuhr* court held, however, that "when an improper statement is made, if 'the trial court sustains a timely objection and instructs the jury to disregard the improper comment, the court sufficiently cures any prejudice.' " *Zickuhr*, 2011 IL App (1st) 103430, ¶ 75 (quoting *Willaby v. Bendersky*, 383 Ill. App. 3d 853, 862 (2008)).

¶ 109 The trial court sanctioned plaintiff's counsel's "send a message" theme by overruling subsequent objections to similar remarks. While improper "send a message" cases traditionally have involved prosecutors informing juries that they need to send a message to criminals (see *People v. Johnson*, 208 Ill. 2d 53 (2004); *People v. Harris*, 129 Ill. 2d 123 (1989); *People v. Chavez*, 265 Ill. App. 3d 451 (1994); *People v. Batson*, 225 Ill. App. 3d 157 (1992)), courts have also analyzed the propriety of informing civil juries to "send out a message." See *Department of Conservation v. Strassheim*, 92 Ill. App. 3d 689, 695 (1981); *Zoerner v. Iwan*, 250 Ill. App. 3d 576 (1993); *Spyrka v. County of Cook*, 366 Ill. App. 3d 156 (2006).

¶ 110 In a criminal context, our supreme court has noted that our appellate court has "both sanctioned and condemned prosecutors' exhortations to 'send a message' ***." *Johnson*, 208 Ill. 2d at 78. The *Johnson* court found that "*limited* prosecutorial exhortations are proper where it is

made clear to the jury that its ability to effect general and specific deterrence is dependent *solely* upon its careful consideration of the specific facts and issues before it ***." (Emphasis in original.) *Id.* at 79. However, the court went on to note where a "prosecutor blurs that distinction by an extended and general denunciation of society's ills and, in effect, challenges the jury to 'send a message' by its verdict, he does more than urge 'the fearless administration of justice,' he interjects matters that have no real bearing upon the case at hand, and he seeks to incite the jury to act out of undifferentiated passion and outrage, rather than reason and deliberation." *Id.*

¶ 111 Similarly, in the medical malpractice arena, closing arguments are improper when they "appeal[] to emotion, rather than the evidence in the case before the jury." *Spyrka*, 366 Ill. App. 3d at 170. In *Spyrka*, plaintiff's counsel improperly stated, during closing:

> "A precious job, and in this case you have been asked to do something very hard, to tell two parties whether or not medical care was acceptable. Same type we either receive or may receive in the future. Any or all of us. *** It is your voice today that will enable you to cherish, to protect that medical system. To use your voices to say, is the type of treatment Mrs. Spyrka got at Cook County Hospital, was that treatment reasonable or was it unreasonable? Is the type of treatment that Cook County should give to patients like Mrs. Spyrka in the future?" (Internal quotation marks omitted.) *Id.* at 169.

¶ 112 For the case at bar, I find plaintiff's counsel's remarks to this jury substantially similar to

the improper remarks in *Spyrka*. Plaintiff's counsel told the jury to "remember, folks, if you return a verdict in favor of the defendant in this case, what you are saying is to everyone that you approve of this kind of treatment ***." The majority acknowledges this was an "appeal to the jurors' sympathies" (*supra*, ¶ 77), yet finds the trial court "cured" the prejudice it caused despite the fact that the trial judge overruled defendants' objection to the following: "if you return a verdict for Dr. Kristal, I don't know what else you would be saying except – – ***. You are saying that what you heard in evidence in this case is not negligence. That's what you would be saying."

¶ 113 The majority finds this statement "was proper as it stated the law and asked the jury to decide if Kristal's actions constituted negligence." *Supra,* ¶ 77. The majority could not be more wrong. A verdict for defendants could be based upon a finding that the plaintiff's eye was doomed the moment it was infected by this particular virus regardless of the quality of care provided by defendants. This statement ignores basic principles of proximate cause; that is, the plaintiff not only had the burden of proving that Dr. Kristal was negligent in her treatment of the plaintiff, but also that it was that negligence which caused plaintiff to lose his eye.

¶ 114 The trial court properly instructed the jury that defendants denied "that any claimed act and/or omission on the part of the defendants was a proximate cause of the plaintiff's claimed injuries." The trial court also instructed the jury that "plaintiff has the burden of proving *** that the negligence of the defendants was a proximate cause of the injury to the plaintiff." Again, over objection, plaintiff was allowed to tell the jury that "if you return a verdict for Dr. Kristal, I don't know what else you would be saying except — — ***. You are saying that what you heard in evidence in this case in not negligence. That's what you would be saying." These comments

are beyond the pale, in light of defendants' sole proximate cause defense.

¶ 115 These comments advise the jury to ignore the law, the proximate cause element of plaintiff's case. The jury could have found Dr. Kristal negligent in her postoperative treatment of the plaintiff but that her negligence was not a proximate cause of plaintiff's injuries. I find the remarks denied the defendants a fair trial by inviting jury nullification and, therefore, would award defendant a new trial. See *Sutton v. Overcash*, 251 Ill. App. 3d 737 (1993); *People v. Smith*, 296 Ill. App. 3d 435 (1998).

¶ 116 C. Special Interrogatory

¶ 117 Finally, I disagree with the majority's conclusion that the trial court committed no error when refusing defendants' special interrogatory. *Supra*, ¶ 65. The majority claims that since "the bacteria in plaintiff's eye was not at issue, the jury was required to make only one proximate cause finding – whether defendants' treatment or lack thereof was a proximate cause of plaintiff's injuries" and therefore submitting defendants' interrogatory "would have been improper and could have confused the jury." *Supra,* ¶ 65. The majority cites *Carillo* as support for its conclusion.

¶ 118 The majority's assertion is curious given the fact, as defendants pointed out to this court, that the trial court gave Illinois Pattern Jury Instruction, Civil, No. 12.05 (2011) (hereinafter, IPI Civil (2011) No. 12.05). The trial court instructed the jury as follows:

> "If you decide that the defendant was negligent and that her negligence was a proximate cause of injury to the plaintiff, it is not a defense that something else may have been a cause of the injury.
>
> However, if you decide that the sole proximate cause of

injury to the plaintiff was something other than the conduct of the defendant, then your verdict should be for the defendant."

¶ 119 During the jury instruction conference, plaintiff's counsel objected to this instruction. While arguing over IPI Civil (2011) No. 12.05 and the special interrogatory, plaintiff's counsel acknowledged the experts differed on whether the infectious presence of the bacteria, known as endophthalmitis, determined the outcome of loss of sight. Plaintiff's counsel questioned, "was it absolutely according to what Smiddy says? That there was nothing going to be able to be done? Or – – that's a fact. Or according to Smith, that there was treatment available that could have given a – – the plaintiff in this case a good result or a fair result or whatever – – a good outcome or whatever." Plaintiff's counsel continued, "The disease is not the issue in this case. It's the treatment that was rendered. She didn't cause the disease. We never said she did. Think about it. She didn't cause the endophthalmitis. Our argument and our case, fact-based case, is that she didn't perform the appropriate treatment for endophthalmitis. Nowhere in this evidence, ours or otherwise, does it say that her deviation from the standard of care is that she caused the endophthalmitis."

¶ 120 Defense counsel noted Dr. Smiddy testified that regardless of what care and treatment Dr. Kristal rendered once the bacteria entered the eye, sight could not have been saved. Dr. Kishore made a similar statement, during his deposition, which defense counsel was prohibited from putting in front of the jury. Plaintiff's counsel acknowledged that Dr. Kristal did not cause the bacteria to invade the plaintiff's eye. Plaintiff's entire case was premised, to use his own counsel's words, on the fact "that she didn't perform the appropriate treatment for endophthalmitis."

¶ 121 Undoubtedly, the trial court correctly gave the jury IPI Civil (2011) No. 12.05. The same evidence adduced at trial and arguments leading to that instruction entitled defendants to have the jury presented with the special interrogatory. As this court noted in *Noel v. Jones*, 177 Ill. App. 3d 773 (1988), "A special interrogatory in proper form *must* be submitted to the jury. The trial court has no discretion [citation], even if the subject matter of the special interrogatory is covered by an instruction." (Emphasis in original.) *Id.* at 783. "A special interrogatory is in proper form if it relates to an ultimate question of fact upon which the rights of the parties depend (citation), and an answer responsive thereto might be inconsistent with a general jury verdict." *Id.*

¶ 122 A finding that the bacteria and not Dr. Kristal's treatment was the sole proximate cause of plaintiff's loss of sight would have undoubtedly been inconsistent with the general verdict and relates to an ultimate question in the case. As such, the special interrogatory was in proper form and should have been given.

¶ 123 To support its conclusion to the contrary, the majority relies upon *Carillo v. Ford Motor Co*. *Supra*, ¶¶ 64-65. *Carillo* is an entirely different case than the one before us. In a nutshell, *Carillo* was a products liability case premised upon the notion that a Ford Explorer seat was unreasonably dangerous because it failed when the Explorer was struck in the rear at approximately 50 miles per hour. In that case, the negligence of the striking driver was not an issue. The plaintiff's theory was that the seat was unreasonably dangerous because a reasonably well designed car seat would withstand the 50 mile-per-hour impact occasioned by the striking driver's negligence. Therefore, Ford's suggested sole proximate cause instruction was inappropriate in light of the posture of that case.

¶ 124 The majority states that "[b]ecause the bacteria in plaintiff's eye was not at issue, the jury

was required to make only one proximate cause finding – whether defendants' treatment or lack thereof was a proximate cause of plaintiff's injuries." *Supra*, ¶ 65. With all due respect, this is simply wrong. The defendants put forth the affirmative defense that the type of bacteria in plaintiff's eye was the sole proximate cause of plaintiff's injuries: even if defendants were negligent, that negligence was not a proximate cause of plaintiff's injuries. As mentioned above (¶ 118), the trial court even gave the jury a sole proximate cause instruction. *Carillo* is inapposite to the facts of this case. The majority's analysis of this issue ignores the facts of this case.

¶ 125 I am well aware that no one is entitled to a perfect trial. I would reverse and remand for a fair trial.