2011 IL App (5th) 090315-U

NO. 5-09-0315

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

MILDRED DICKERSON and LONNIE DICKERSON, Plaintiffs-Appellants and Cross-Appellees, v. MIDWEST EMERGENCY DEPARTMENT SERVICES, INC., JON M. CUMBERLEDGE, M.D., and ST. ELIZABETH'S HOSPITAL OF THE HOSPITAL SISTERS OF THE THIRD OF ST. FRANCIS, a Not-for-Profit Corporation, Defendants-Appellees, and BRADLEY MITCHELL, D.D.S., Defendant-Appellee and Cross-Appellant, and RED BUD CLINIC CORP., d/b/a Red Bud Family Health, and ELLEN M. MIDDENDORF, M.D., Defendants.	)	Appeal from the Circuit Court of St. Clair County. No. 05-L-302 Honorable Andrew J. Gleeson, Judge, presiding.

JUSTICE SPOMER delivered the judgment of the court.
Presiding Justice Chapman and Justice Welch concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court did not err in denying the plaintiffs' motion for a judgment notwithstanding the verdict regarding the jury verdict in favor of Dr. Mitchell, because the jury's verdict was not against the manifest weight of the evidence, and in denying the plaintiffs' motion for a new trial on all other issues, which was based on the plaintiffs' argument that the circuit court erred in (1)

admitting custom and habit testimony from defendant physicians regarding their procedures for taking and updating patient histories and performing physical examinations of patients, (2) admitting testimony by defendant physicians regarding specific details concerning their custom and habits and their treatment of the plaintiffs that were not disclosed pursuant to Illinois Supreme Court 213(g) (eff. Jan. 1, 2007), and (3) admitting specific opinion witness testimony that the plaintiffs claimed was based on an inaccurate understanding of the definition of the standard of care and speculation.

¶ 2 The plaintiffs, Mildred Dickerson and Lonnie Dickerson, appeal from the November 17, 2008, judgment entered by the circuit court of St. Clair County after a jury verdict in favor of the defendants, Midwest Emergency Department Services, Inc. (MEDS), Jon M. Cumberledge, M.D., St. Elizabeth's Hospital of the Hospital Sisters of the Third of St. Francis, a not-for-profit corporation (St. Elizabeth's), and Bradley Mitchell, D.D.S. The plaintiffs claim that the circuit court made the following reversible errors during the trial: (1) admitting testimony by Dr. Cumberledge and Dr. Mitchell regarding their customs and habits in taking patient histories and conducting medical evaluations, (2) admitting expert opinion testimony not previously disclosed as required by Illinois Supreme Court Rule 213(g) (eff. Jan. 1, 2007), (3) admitting opinion testimony from an expert who incorrectly enunciated the standard of care, (4) admitting opinion testimony from the same expert that was based on speculation, (5) allowing the use of a special verdict form that contradicted the general verdict form on the issue of the apparent agency of MEDS, and (6) denying the plaintiffs' motion for a judgment notwithstanding the verdict (*n.o.v.*) on the plaintiffs' claims against Dr. Mitchell. Dr. Mitchell cross-appeals, arguing that the circuit court erred in denying his motion for a summary judgment and in certain evidentiary rulings made during the trial. For the following reasons, we affirm the judgment of the circuit court, rendering Dr. Mitchell's cross-appeal moot.

¶ 3 FACTS

¶ 4 1. Pretrial Proceedings

¶ 5 On June 16, 2005, the plaintiffs filed a first amended complaint in the circuit court of

St. Clair County, which was again amended on January 3, 2008, alleging causes of action for personal injuries and loss of consortium against MEDS, Dr. Cumberledge, St. Elizabeth's, and Dr. Mitchell, as well as Red Bud Clinic Corporation, doing business as Red Bud Regional Family Health (Red Bud Clinic), and Ellen M. Middendorf, M.D. In the amended complaint, the plaintiffs alleged that Mildred suffered from severe personal injuries, and Lonnie from a loss of consortium, when Mildred contracted infective endocarditis (IE), an infection of the heart caused by bacteria in the bloodstream, and a subsequent mycotic aneurism, as a result of the defendants' negligence. In particular, the plaintiffs alleged that Dr. Mitchell caused Mildred to contract IE when he negligently failed to prescribe antibiotics to Mildred prior to pulling several of her teeth on December 8, 2004, failed to take an adequate medical history from Mildred, and failed to adequately treat her dental infections in a timely manner. In addition, the plaintiffs alleged that Dr. Cumberledge was negligent in failing to diagnose Mildred's IE when Mildred consulted with Dr. Cumberledge at St. Elizabeth's Urgicare on January 13, 2005, and that St. Elizabeth's and MEDS were liable under a theory of apparent agency. Similarly, the plaintiffs alleged that Dr. Middendorf was negligent in failing to diagnose Mildred's IE when Mildred consulted with Dr. Middendorf at Red Bud Clinic on January 18, 2005, and that Red Bud Clinic was liable under an agency theory. Red Bud Clinic and Dr. Middendorf were dismissed from the action prior to the trial by virtue of a good-faith settlement finding and thus are not parties to this appeal.

¶ 6 Prior to and during the trial, the plaintiffs filed several motions *in limine*, moving to exclude all the evidence of which they complain on appeal. The circuit court ultimately denied these motions. On October 29, 2008, the circuit court commenced a jury trial, during which the issues of whether Dr. Mitchell and Dr. Cumberledge breached the standard of care and whether any such breach caused Mildred to contract IE and the resulting mycotic aneurism were highly contested by the witnesses.

¶ 7 2. Dr. Mitchell–Standard of Care

¶ 8 With regard to the issue of whether Dr. Mitchell breached the standard of care, the evidence adduced was as follows. Dr. Finley Brown, Jr., a physician who is both board-certified and a diplomat in family medicine, testified first for the plaintiff as a retained expert witness. After giving extensive background into his education and training, Dr. Brown testified that IE is an inflammation or infection of the heart which occurs when bacteria released into the bloodstream circulates through the body. In normal people, bacteria occasionally gets into the bloodstream and is filtered out through the body's own defense mechanisms. In patients with valvular heart disease, however, bacteria can stick to the damaged heart valve, multiply, and cause an infection of the heart.

¶ 9 Dr. Brown also explained how a mycotic aneurism can result from IE. As bacteria grows on a damaged heart valve, a piece of the resulting debris can break off and work its way to the bloodstream. When this piece travels into one of the carotid arteries and gets lodged into the brain, causing the arterial wall in the brain to weaken, bulge, and eventually rupture, the result is a mycotic aneurism. This is what happened to Mildred in late January 2005, causing her eventual hospitalization at St. Anthony's Medical Center in St. Louis and two brain surgeries.

¶ 10 Dr. Brown testified regarding Mildred's history prior to her contracting IE and the resulting mycotic aneurism, via his review of her medical records. Mildred was first examined by a cardiologist, Dr. Jacobs, in 1998. At that time she had a grade three systolic heart murmur, which is a reasonably loud murmur that is easily heard using a stethoscope. After echocardiograms, Mildred was diagnosed with a calcified aortic valve and aortic stenosis and insufficiency, as well as a mitral valve insufficiency. This meant that the blood did not flow through the heart as well as it should. Dr. Jacobs determined, after an echocardiogram and other diagnostic testing, that no treatment was required at that point and

that Mildred's condition should be reviewed every six months. Based on his review of Dr. Jacobs' deposition, Dr. Brown testified that Dr. Jacobs told Mildred that she would require prophylactic antibiotics prior to any dental procedure to prevent endocarditis. Mildred never returned to Dr. Jacobs to follow up on her heart condition.

¶ 11 Based on his review of the records, Dr. Brown testified that Mildred did not visit any health care providers besides Dr. Mitchell from 1998 until 2004. Dr. Mitchell was Mildred's general dentist for 17 years. Dr. Mitchell's records show that on March 6, 1999, Mildred saw Dr. Mitchell for some dental work and got some estimates for extractions, and Dr. Mitchell made a notation in Mildred's chart that "patient has to check with her doctor." Mildred did not come back to Dr. Mitchell, apparently delaying the recommended extractions, until January 3, 2001, when she presented with an abscess in two teeth. Dr. Mitchell gave Mildred a prescription for antibiotics at that time, which was filled. Mildred then returned to Dr. Mitchell on January 9, 2001, for an extraction of these teeth.

¶ 12 Based on the foregoing records, Dr. Brown deduced that Mildred told Dr. Mitchell on March 6, 1999, that she had a condition requiring antibiotics prior to extractions and that is why he prescribed her antibiotics on January 3, 2001, prior to the January 9, 2001, extractions. However, based on his review of Dr. Mitchell's records and Mildred's pharmacy records from December 1, 2004, when Dr. Mitchell performed the eight tooth extractions at issue, Dr. Brown determined that Dr. Mitchell had not prescribed a prophylactic antibiotic for Mildred prior to extracting her teeth, but only pain medication.

¶ 13 Winona Wilson testified that she is the plaintiffs' daughter. Winona confirmed the facts and circumstances surrounding Mildred's diagnosis with a heart valve condition in the 1990s, her tooth extractions with Dr. Mitchell in 2004, the fact that she was not prescribed an antibiotic prior to the extractions, and her subsequent illness. On cross-examination, Winona testified that after Mildred was diagnosed with the "floppy valve" in 1998, she never

mentioned her heart condition again and never went back to the doctor. Winona does not know whether Mildred told Dr. Mitchell about her heart condition before her dental procedure.

¶ 14 The video evidence deposition of Dr. Joanne Baxter, a dentist licensed in Pennsylvania, Illinois, and Arizona, was played for the jury. Dr. Baxter testified that Dr. Mitchell violated the standard of care by failing to get an adequate follow-up history from Mildred regarding her heart conditions. Specifically, Dr. Baxter found that Mildred was seen 14 times in a period of 17 years and that, based on her review of his records, Dr. Mitchell never updated her medical history. She testified that the medical history form that Mildred filled out in 1987 met the standard of care for that time but would not meet the standard of care for 2004 because it does not contain specific questions regarding heart valve issues. Dr. Baxter testified that the standard of care required Dr. Mitchell to update Mildred's medical history every six months and to place a form verifying this history in Mildred's chart. If Dr. Mitchell did not see Mildred for two years, the standard of care required Dr. Mitchell to give Mildred a new form to complete. On March 6, 1999, according to the records, Mildred discussed the possibility of a complete upper denture, and there was a note, "patient is to check with her M.D." According to Dr. Baxter, this was a red flag that Dr. Mitchell should consult with Mildred's doctor and/or update her patient history in 2004, prior to the extractions.

¶ 15 Dr. Baxter explained how the dental extractions placed Mildred at risk of bacteria entering the bloodstream. Dr. Baxter opined that due to Mildred's heart condition, Dr. Mitchell breached the standard of care by failing to give Mildred antibiotic prophylaxis prior to the procedure, failing to confirm prior to the procedure that she had taken antibiotics, and failing to take X rays within six months prior to the procedure. On cross-examination, Dr. Baxter admitted that there have been times in her practice where she failed to chart

something that she did and that she does not always chart normal findings. When a dentist obtains a history from a patient, the standard of care allows the dentist to rely on the history given by the patient upon questioning. Dr. Baxter testified further on cross-examination that if Dr. Mitchell asked Mildred questions related to a possible health condition when she came into his office, and she denied having a heart condition, or denied a history of a heart condition, he met the standard of care and would not be required to consult her doctor.

¶ 16 Dr. Jason Allen, a board-certified general dentist who treated Mildred in July 2005, subsequent to her stroke and mycotic aneurism, testified regarding his experience in treating Mildred. Dr. Allen confirmed that the standard of care for a general dentist would be to take a written medical history and to update that history yearly and verbally update on each visit. Dr. Allen testified that prior to treating Mildred, he asked her over the phone whether she had a mitral valve prolapse, as a means of looking for indications that she would require a prophylactic antibiotic, and she answered no. However, on the written medical history form Mildred filled out for Dr. Allen, she marked a history of heart conditions and stroke. On cross-examination, Dr. Allen testified that he had no personal recollection of having treated Mildred and so was relying solely on his routine and habit, along with Mildred's records from his office, to testify. He stated that Mildred never told him of her specific heart condition or he would have written it in his records. He testified that a dentist meets the standard of care if he asks for a verbal update upon each visit and that a dentist is entitled to rely on what the patient tells him with regard to the medical history. If a dentist is not told of a heart condition requiring a prophylactic antibiotic, then the dentist is not required to give that antibiotic and would not need to consult with the patient's physician.

¶ 17 Mildred testified that she does not remember what Dr. Jacobs told her in 1998 about her heart condition. She never returned to Dr. Jacobs or consulted with any other doctor other than Dr. Mitchell between 1998 and January 2005. In 1999, she began talking with Dr.

Mitchell about removing a number of her upper teeth. According to her testimony, at that time Mildred told Dr. Mitchell that she needed to check with Dr. Jacobs, and she stated that she mentioned Dr. Jacobs again in 2004 prior to the extractions. At that time, Dr. Mitchell stated, "I know what to do." Mildred testified that Dr. Mitchell did not give her an antibiotic prescription prior to the extractions and that she began experiencing a low-grade fever, night sweats, and fatigue three or four days following the extractions.

¶ 18 On cross-examination, Mildred admitted that Dr. Jacobs told her in 1998 that all her testing was normal, and stated that she never saw him again because she had no concerns about her heart. She does not remember Dr. Jacobs telling her she needed to take precautions before dental procedures or that she had any long-term heart problem. In 1999, she told Dr. Mitchell she had to check with her doctor, but she never did. Mildred was also impeached with a prior inconsistent statement in her deposition to the effect that she did not know why she would have mentioned her heart condition to Dr. Mitchell.

¶ 19 Dr. Mitchell testified that he has been practicing general dentistry in Waterloo for 30 years. Based on his records, Dr. Mitchell testified that he first saw Mildred on October 14, 1987. At that time, she filled out a medical history form that indicated no medical problems. Her next visit to Dr. Mitchell was May 31, 1989. Dr. Mitchell testified that it is his routine to verbally update a patient's medical history when a significant period of time has lapsed since the patient's last visit. His routine is to ask whether the patient has developed any medical problems, has begun taking any medications, has had a joint replacement, or has developed any heart problems, including valve problems or murmurs. According to Dr. Mitchell, his routine is to note any changes in the medical history in the patient's record and to mark in red on the outside of the record if the patient has any condition that requires a prophylactic antibiotic. Accordingly, Dr. Mitchell testified, based on his routine and the fact that the history of a heart condition was not noted on the record, that Mildred never told him

of her heart condition. Dr. Mitchell testified that if the patient does not give him a change in medical history in response to his questioning, he would not write anything in the record. Thus, the record would not reflect that Dr. Mitchell took a verbal medical history update from a patient if the patient does not give an affirmative response to his questioning. Dr. Mitchell testified that, according to his record, the only time Mildred gave him a positive response to his questioning aimed at updating her medical history was during her visit on March 4, 1993, when he noted that Mildred had caught her finger in a press punch at work. During her visit for fillings on March 6, 1999, which was Mildred's first visit to Dr. Mitchell following her consultation with Dr. Jacobs in 1998 when she was diagnosed with the heart conditions, they discussed an estimate for extracting nine upper teeth and placing an immediate denture. On Mildred's way out, she mentioned that she had to check with her doctor. Dr. Mitchell noted this in his chart so that he could follow up.

¶ 20 Dr. Mitchell testified that it was his routine to review a patient's chart the morning of the visit so that he could ask follow-up questions based on his notes. Following their discussion in 1999 about possibly performing the extractions and placing the denture, Mildred did not return to Dr. Mitchell until January 3, 2001, when she came in with an abscess on her tooth. Dr. Mitchell testified, contrary to Dr. Brown's testimony based on his review of the records, that he prescribed an antibiotic for Mildred at that time as a therapeutic medicine to treat an abscess, and not as a prophylactic in preparation for extractions. He did perform a single extraction on the abscessed tooth for Mildred on January 9, 2001.

¶ 21 On October 21, 2004, Mildred finally came in to begin the process for performing the extractions and placing the upper denture that had been first discussed in 1999. On that date, Dr. Mitchell took the impression for the denture. He testified that based on his routine, he would have taken an updated history from Mildred on that date and noted any changes in the chart. Dr. Mitchell testified that his routine was to again take an updated medical history on

the date of the extractions, which was December 1, 2004. On December 8, 2004, at Mildred's follow-up appointment after the extractions, she did not mention that she did not feel well or that she had been experiencing a fever. Dr. Mitchell testified that if she would have, he would have prescribed antibiotics and scheduled another follow-up appointment. Defense counsel read Mildred's interrogatory answers and deposition testimony to the jury, wherein Mildred stated that she did not know why she would have told Dr. Mitchell about her heart condition.

¶ 22 Dr. Tom Denny testified that he has been a general dentist for 32 years. Dr. Denny opined that Dr. Mitchell's initial medical history form conformed to the standard of care. He testified that if Dr. Mitchell took a periodic verbal update of the medical history with the patient, documented changes, and asked follow-up questions related to those changes, then Dr. Mitchell met the standard of care. He testified that if the patient does not report any history to alert the dentist that there may be a need for a prophylactic antibiotic, then the standard of care does not require that it be given to the patient and that the standard of care allows the dentist to rely on the history provided by the patient.

¶ 23 3. Dr. Mitchell–Causation

¶ 24 Concerning the issue of whether any alleged breach of the standard of care by Dr. Mitchell in failing to provide a prophylactic antibiotic to Mildred prior to the extractions caused or contributed to cause her to develop IE, the following evidence was adduced. The plaintiffs' retained expert, Dr. Finley Brown, who is a board-certified family medicine physician, testified that, assuming an appropriate expert in the area of general dentistry testified that Dr. Mitchell's failure to prescribe an antibiotic for Mildred prior to the December 1, 2004, extractions was a breach of the standard of care, the failure to prescribe the antibiotic contributed to cause Mildred's IE and resulting mycotic aneurism. Dr. Brown opined that Mildred developed IE within three days after the extractions. On cross-

examination, Dr. Brown testified that he is not an expert in dentistry. He has not conducted any research on the effectiveness of antibiotic prophylaxis prior to dental procedures in patients with cardiac risk factors. Dr. Brown recognized that antibiotic prophylaxis can fail, and he has not researched the frequency of those failures.

¶ 25 Dr. Eli Shuter, a board-certified neurologist retained by the plaintiffs, testified to his opinion that Mildred's mycotic aneurism, which ruptured on January 20, 2005, causing her to collapse and leading to her subsequent hospitalization and surgeries, was caused by her IE. Dr. James Mathews, an emergency room physician who is board-certified in emergency medicine and internal medicine and who was retained by the plaintiffs, testified via video evidence deposition that the risk of IE is especially increased for cardiac patients who undergo procedures such as dental extractions and that antibiotic prophylaxis can reduce the risk of IE. Dr. Mathews concluded that Dr. Mitchell's failure to give Mildred an antibiotic prior to the extractions caused her to contract IE and the resulting mycotic aneurism. On cross-examination, Dr. Mathews admitted that there is a possibility that the failure to give the prophylactic antibiotic was not the cause of the IE.

¶ 26 Dr. Joseph Lentino, an infectious disease physician and microbiologist who is board-certified in internal medicine and infectious disease and who is a professor at Loyola University School of Medicine, testified as a retained expert witness for the defense. Dr. Lentino testified that he studied IE and has reviewed research on the effectiveness of antibiotic prophylaxis to prevent IE. He testified that the frequency of bacteria entering the bloodstream is greater from the activities of daily living than from dental extractions and that the frequency of bacteria entering the bloodstream is a greater risk factor for IE than the number of bacteria entering the bloodstream at any given time. Dr. Lentino testified that he investigates antibiotic prophylaxis failures and that there are no scientific studies confirming that antibiotic prophylaxis is effective in preventing IE. Finally, Dr. Lentino testified that it

would take one to two weeks for Mildred's IE to become symptomatic after bacteria had become introduced into her bloodstream. Dr. Lentino opined that because Mildred's symptoms developed one to three days after the extractions, the IE was not initiated by the extractions.

¶ 27 Dr. Howard Pitchon, a board-certified internal medicine and infectious disease physician, testified in rebuttal for the plaintiffs via a video evidence deposition. Dr. Pitchon testified that he has published articles on IE and that a prophylactic antibiotic is required to prevent IE when a dental procedure will place a patient like Mildred, who has a history of valve problems, at high risk for IE. Dr. Pitchon testified that the IE was most likely caused by the dental extractions due to the type of bacteria found in Mildred's blood cultures, which is known to originate from the mouth. Dr. Pitchon testified that a prophylactic antibiotic would have helped to prevent the IE but that no definitive study confirms this because the principles of human studies would prevent a double-blind study of this type. On cross-examination, Dr. Pitchon admitted that IE can occur despite antibiotic prophylaxis being given and that he would be unable to state, with a reasonable degree of medical certainty, whether giving a prophylactic antibiotic would have prevented Mildred from contracting IE.

¶ 28 4. Dr. Cumberledge–Standard of Care

¶ 29 The evidence adduced on the issue of whether Dr. Cumberledge breached the standard of care when Mildred presented to him at the Urgicare on January 13, 2005, is as follows. Dr. Finley Brown, the plaintiff's expert witness in family medicine, testified to his review of Dr. Cumberledge's records. Based on the records, Dr. Brown testified that a nurse tech obtained a history from Mildred on that visit and that her chief complaint was that she had a fever and a cough for three weeks, some shortness of breath, congestion, and night sweats. The nurse also noted that Mildred had dental work two weeks prior to her visit to Urgicare. Dr. Cumberledge's record from that visit also notes a fever and a cough for three weeks. The

record reflects that Dr. Cumberledge made a diagnosis of acute bronchitis and sinusitis and did not diagnose IE or a mycotic aneurism.

¶ 30 Dr. Brown opined that Dr. Cumberledge breached the standard of care for a family practice physician when he failed to take an adequate history from Mildred and ascertain her valvular heart disease through a history and the location of her murmur by a stethoscopic examination, failed to recognize the signs and symptoms of IE, and failed to hospitalize Mildred, order blood cultures and an echocardiogram to confirm a diagnosis, and begin administering prophylactic antibiotics while awaiting the results.

¶ 31 On cross-examination, Dr. Brown conceded that based on Dr. Cumberledge's records, an incorrect history was given, in that it was noted that Mildred had dental work two weeks prior to her visit to Urgicare and that she had a fever for three weeks, indicating that the fever preceded the dental work. In addition, Dr. Brown conceded that when Mildred presented to Dr. Cumberledge at Urgicare, she did not have a fever. Dr. Brown further testified on cross-examination that Mildred's complaints that day, including a fever, a cough, and some shortness of breath, are nonspecific symptoms which can be associated with many different diseases and conditions and that all of Mildred's symptoms, and Dr. Cumberledge's findings on examination, are consistent with his diagnosis of bronchitis and sinusitis.

¶ 32 Dr. Brown also testified on cross-examination to his review of records from Mildred's visit to Dr. Middendorf at Red Bud Clinic on January 18, 2005, five days after her visit to Dr. Cumberledge at Urgicare. Based on Dr. Middendorf's records, Mildred communicated a history of heart valve problems, and Dr. Middendorf recorded hearing a murmur on a stethoscopic examination. Mildred presented with the same symptoms as when she presented to Dr. Cumberledge at Urgicare: a cough, a fever, chills, and night sweats. Dr. Middendorf diagnosed a cough, likely due to viral symptoms, and ordered a chest X ray.

¶ 33 Dr. Brown was also cross-examined regarding Cecil's Textbook of Medicine, twenty-

second edition (Cecil's), which was published in 2004 and which he recognized as a textbook that is used to train doctors and which he refers to in his practice. According to Cecil's, the initial presentation of IE varies enormously from patient to patient, making the diagnosis difficult at times. Some cases develop acutely with symptoms progressing rapidly over several days, while other cases develop insidiously and present with nonspecific symptoms that have been progressing for weeks or months. Most patients with IE complain of a fever and nonspecific constitutional symptoms such as fatigue, malaise, and weight loss. Nearly half of patients complain of musculoskeletal symptoms, of which Mildred never complained. Dr. Brown also testified that he has made wrong diagnoses in the past but that did not necessarily mean that he breached the standard of care.

¶ 34 Mildred's daughter, Winona, testified that she accompanied Mildred to St. Elizabeth's Urgicare, where she presented to Dr. Cumberledge. Winona testified that she told the nurse that Mildred had been diagnosed with a "floppy valve" and about her previous dental work. She testified that Mildred was not coughing but was clearing her throat a lot. Winona testified that the nurse listened to Mildred with a stethoscope and mentioned an irregular heartbeat. Winona testified that when Dr. Cumberledge came into the room, she repeated Mildred's symptoms to him. Winona specifically testified that she told Dr. Cumberledge about Mildred's heart condition. There was no discussion about the dental work she had done, only that there had been dental work. Winona testified that Dr. Cumberledge also listened to Mildred's heart and made the comment that "it's still there." After Dr. Cumberledge diagnosed bronchitis and prescribed Ketek, Mildred's condition worsened and she followed up with Dr. Middendorf at Red Bud Clinic, who was given the same history and made the same diagnosis. Winona accompanied Mildred to her visit, and she testified that Dr. Middendorf also mentioned an irregular heartbeat upon examination. Three days later Mildred collapsed, was rushed to St. Anthony's Hospital, and was diagnosed with IE and a

mycotic aneurism.

¶ 35 On cross-examination, Winona testified that after Mildred was diagnosed with the "floppy valve" in 1998, she never mentioned her heart condition again and never went back to the doctor. Winona does not know whether Mildred told Dr. Mitchell about her heart condition before her dental procedure. As far as her conversations with Dr. Cumberledge, Winona admitted that her memory was not totally clear, but she was relatively sure that Mildred corrected the history that she gave the nurse regarding when the dental procedure occurred.

¶ 36 Dr. Mathews, the plaintiffs' retained expert in emergency and internal medicine, testified via a video evidence deposition regarding the symptoms of IE, which include an intermittent fever, night sweats, weight loss, fatigue, a history of a dental procedure, and a heart murmur. Dr. Mathews testified that if there is a history of these symptoms for a period of weeks, an internal medicine doctor should be prompted to rule out disease. According to Dr. Mathews, the standard of care required Dr. Cumberledge to send Mildred to the emergency room to rule out IE. Dr. Mathews also opined that the standard of care required Dr. Cumberledge to examine Mildred's heart and lungs and that had Dr. Cumberledge done so, he would have heard Mildred's murmur and had another symptom from which to make a proper diagnosis of IE. On cross-examination, Dr. Mathews testified that he is not a family practice doctor and that IE is a very uncommon disease and is difficult to diagnose. The standard of care allows a doctor to rely on the history provided by the patient, and nothing in Dr. Cumberledge's records indicates that Mildred gave a history of valve problems. In addition, Mildred's symptoms were consistent with bronchitis, which was the diagnosis that Dr. Cumberledge made.

¶ 37 Mildred testified that she told Dr. Cumberledge that she had been to a heart specialist and that Dr. Cumberledge told her he could hear her murmur that day. However, on cross-

examination, Mildred was impeached with her prior inconsistent statement from her deposition that she did not remember telling anyone at Urgicare about her condition and did not remember talking to the nurse or any of the details about what she told Dr. Cumberledge or about his examination of her. Another daughter, Donna Bartlett, testified that she also accompanied Mildred to Urgicare and that she told Dr. Cumberledge about Mildred's history of valve problems and her dental extractions. Ms. Bartlett also testified that Dr. Cumberledge stated that Mildred's heart was "still flopping" during his examination of Mildred. However, on cross-examination, Ms. Bartlett was impeached with her prior inconsistent statements in her deposition that she could not swear that she knew about Mildred's heart condition, that neither she nor her sister told Dr. Cumberledge about Mildred's heart condition, and that she did not remember Dr. Cumberledge saying anything about Mildred's heart during the examination.

¶ 38 Dr. Ellen Middendorf testified regarding Mildred's visit to her on January 18, 2005, five days after Mildred's visit to Dr. Cumberledge. Dr. Middendorf's records indicated that Mildred listed on her intake form that she had been diagnosed with a "floppy valve" but that she could not provide any additional details about her condition when interviewed. Mildred listed the following symptoms on her intake form: night sweats, a cough, sinus trouble, a stuffy nose, and a fever of less than 100 degrees. Dr. Middendorf testified that it is her routine to write down any significant facts given to her by a patient. She did hear Mildred's heart murmur upon a physical examination. She diagnosed Mildred with a viral cough and ordered a chest X ray, which was normal.

¶ 39 Cathy Hungate testified that she is a nurse at St. Elizabeth's Urgicare and, based on the records, was the nurse who first met with Mildred on January 15, 2005, when Mildred presented to Urgicare. Nurse Hungate testified that it is her routine to write down any significant history given to her by the patient, focusing on the patient's chief complaints.

Although she had no specific recollection of Mildred, nurse Hungate testified from her records that Mildred's chief complaints were fever, sweats, and yellow phlegm for three weeks and dental work two weeks prior to Mildred's visit to Urgicare. Nurse Hungate also listened to Mildred's lungs with a stethoscope during her visit.

¶ 40 Dr. Robert Ewart, a board-certified family doctor and associate professor at Southern Illinois University School of Medicine, testified as a retained expert for Dr. Cumberledge. He testified that IE is very rare and difficult to diagnose, that the symptoms are very nonspecific, meaning they are the same symptoms present in any number of conditions or disease processes, and that a cough is not a common symptom of IE. Bronchitis is diagnosed based on a history and a physical examination, and symptoms include a cough, a fever, sweats, chills, and shortness of breath. Dr. Ewart's opinion is that Dr. Cumberledge met the standard of care when he examined Mildred on January 15, 2005, in that he took an appropriate history from Mildred, conducted an appropriate physical examination, made a reasonable diagnosis of bronchitis and sinusitis based on his findings, and prescribed an appropriate treatment and follow-up for Mildred. According to Dr. Ewart, Dr. Cumberledge focused on the presenting problem as any reasonable family practice doctor would. Dr. Ewart opined that Mildred probably did have bronchitis and mild sinusitis at the time she presented to Dr. Cumberledge and that the cough with yellow sputum she presented with would lead to a diagnosis of bronchitis and away from a diagnosis of IE. Dr. Ewart also explained that the fact that Mildred gave a history that indicated that her fever preceded her dental work would lead a reasonable physician away from an IE diagnosis.

¶ 41 Dr. Ewart further explained why he was of the opinion that Dr. Cumberledge's failure to diagnose IE did not violate the standard of care. Mildred gave no history of malaise, weight loss, or heart problems. Accordingly, Dr. Ewart opined that nothing in her presentation required a detailed or comprehensive cardiac exam and that it was reasonable

that Dr. Cumberledge did not hear Mildred's murmur. According to Dr. Ewart, the standard of care did not require Dr. Cumberledge, as a family practice physician, to test for all the possible diseases matching Mildred's symptoms prior to making a diagnosis of bronchitis.

¶ 42 Dr. Lentino, the defendants' retained infectious disease doctor, agreed that IE is very rare and is difficult to diagnose due to its delayed, nonspecific symptomology. Dr. Lentino concurred that a cough is not a symptom of IE, and he pointed to classic examination findings with IE, such as skin spots and muscle and joint pain, of which Mildred did not complain during her visit with Dr. Cumberledge. Dr. Lentino opined that Dr. Cumberledge met the standard of care in diagnosing bronchitis because it was cold and flu season, Mildred presented with classic symptoms of viral respiratory tract infections, and Mildred gave no history of cardiac problems.

¶ 43 Dr. Cumberledge testified that he is a board-certified family practice doctor and has been licensed in Illinois since 1995. He testified that it is his routine to take a history from every patient, beginning with broad questions regarding the patient's history of any present illness and a medical history and a review of all the patient's systems and family and social history. He would then conduct a physical examination tailored to the patient's complaint, conduct an investigation of any possible diagnoses, and prescribe the appropriate treatment and follow-up. His routine is to ask all patients if there are any medical problems or conditions or past diagnoses of any kind. As for a physical examination, his routine with a patient presenting with a cough is to conduct an ear, nose, throat, and respiratory examination. His routine would not be to conduct a cardiac examination unless the patient's symptomology so indicated. During a respiratory examination, he would listen to the heart in one place, near the sternum. He would record any pertinent positive or negative findings in the patient's chart. If Mildred would have given him a history of heart problems or if he would have heard a murmur on physical examination, these findings would be in the record.

Because Mildred reported a fever that preceded the dental work, this appeared to be incidental. Dr. Cumberledge testified that if Mildred would have given a correct history, which was dental work 6 weeks prior with a fever for 5½ weeks, he would have ordered further testing to rule out pneumonia, cancer, or tuberculosis, including X rays and blood work. Dr. Cumberledge testified that Mildred's presentation was classic bronchitis, and he treated her as such, instructing her to follow up in three to five days if her medication did not resolve her symptoms.

¶ 44 5. Dr. Cumberledge–Causation

¶ 45 Evidence adduced at the trial on the issue of whether or not Dr. Cumberledge's failure to diagnose Mildred's IE on January 15, 2005, contributed to cause her resulting damages is as follows. Dr. Shuter, the plaintiffs' retained neurologist, testified that if Dr. Cumberledge had provided appropriate antibiotic treatment for Mildred's IE, which consists of a five-week course of intravenous antibiotic, this would have destroyed the bacteria that broke off from Mildred's heart valve and would have prevented the aneurism from rupturing. However, on cross-examination, Dr. Shuter admitted that some aneurisms do get bigger and worse even with effective antibiotic treatment, although these situations are unusual. Dr. Mathews, the plaintiffs' retained expert in emergency and internal medicine, testified via a video evidence deposition that if Mildred's treatment for IE would have begun on the date she presented to Dr. Cumberledge, her aneurism might have been prevented but there is no way to guarantee this.

¶ 46 Dr. Lentino, Dr. Cumberledge's retained expert in infectious disease, testified that if Mildred had begun treatment for her IE on January 15, 2005, she would have been in the same situation as she was in on January 21, 2005, the day she collapsed and presented to St. Anthony's and began treatment. Her condition still would have required a lengthy hospital stay with a long course of antibiotics, and her aneurism, which was already present when

Mildred presented to Dr. Cumberledge, would have continued to progress and at least would have leaked if not ruptured, causing strokelike symptoms and requiring surgery. Dr. Lentino testified that Mildred's heart valve surgery also would have been necessary regardless of the six-day delay in beginning treatment. Dr. Pitchon, the plaintiffs' retained expert in infectious disease, testified that the proper treatment of Mildred's IE by Dr. Cumberledge would have prevented the aneurism from rupturing, but he admitted on cross-examination that an aneurism can rupture despite antibiotic treatment and that it takes weeks to develop, not days.

¶ 47 6. Jury Verdict and Posttrial Proceedings

¶ 48 On November 17, 2008, the jury returned a verdict in favor of all the defendants on all the counts of the complaint, and the circuit court entered a judgment on the verdict. On February 2, 2009, after a motion for an extension of time was granted, the plaintiffs filed a motion for a judgment *n.o.v.* on the counts of the complaint directed against Dr. Mitchell and a motion for a new trial on all the counts of the complaint. On May 26, 2009, the circuit court denied the plaintiffs' posttrial motions. On June 23, 2009, the plaintiffs filed a timely notice of appeal, and on July 2, 2009, Dr. Mitchell filed a notice of cross-appeal. Additional facts will be provided as needed throughout this order.

¶ 49 ANALYSIS

¶ 50 1. Motion for New Trial on All Issues

¶ 51 a. *Standard of Review*

¶ 52 The determination of whether to grant a new trial is addressed to the sound discretion of the trial court and will not be reversed except in those instances where it is affirmatively shown that the trial court clearly abused its discretion. *Maple v. Gustafson*, 151 Ill. 2d 445, 455 (1992). In describing the method by which an appellate court should apply the standard of review to a motion for a new trial, the Illinois Supreme Court explained as follows:

"In determining whether the trial court abused its discretion, the reviewing court

should consider whether the jury's verdict was supported by the evidence and whether the losing party was denied a fair trial. [Citation.] Futhermore, it is important to keep in mind that ' "[t]he presiding judge in passing upon the motion for new trial has the benefit of his previous observation of the appearance of the witnesses, their manner in testifying, and of the circumstances aiding in the determination of credibility." ' [Citations.] If the trial judge, in the exercise of his discretion, finds that the verdict is against the manifest weight of the evidence, he should grant a new trial; on the other hand, where there is sufficient evidence to support the verdict of the jury, it constitutes an abuse of discretion for the trial court to grant a motion for a new trial. [Citations.]" *Id.* at 455-56.

¶ 53 With these directions regarding the standard of review in mind, we now turn to the plaintiffs' contentions on appeal regarding why the circuit court erred in denying their motion for a new trial.

¶ 54 b. *Custom and Habit Testimony*

¶ 55 The plaintiffs argue that they are entitled to a new trial because the trial court erred in admitting custom and habit evidence at nearly every stage of the trial. In particular, the plaintiffs take issue with the following testimony: (1) testimony by Dr. Mitchell, Dr. Cumberledge, and nurse Hungate regarding their customs or habits in taking and recording patient histories and (2) testimony by Dr. Cumberledge regarding his customs or habits in conducting and recording physical examinations of patients. "Habit evidence is a description of a person's regular response to a repeated specific situation so that doing the habitual act becomes semiautomatic." *Grewe v. West Washington County Unit District No. 10*, 303 Ill. App. 3d 299, 306 (1999) (citing M. Graham, Cleary & Graham's Handbook of Illinois Evidence §406.1 (6th ed. 1994)).

¶ 56 The Illinois Supreme Court has recently adopted the language of Federal Rule of

Evidence 406 as Illinois Rule of Evidence 406 (eff. Jan. 1, 2011), which provides as follows:

> "Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice."

¶ 57 Prior to the adoption of Illinois Rule of Evidence 406, Illinois law governing the admissibility of evidence of habit had been inconsistent. See *People v. Keller*, 267 Ill. App. 3d 602, 607-08 (1994) (recognizing that "[t]he rule governing admissibility of habit or custom evidence has an uncertain history" (citing M. Graham, Cleary & Graham's Handbook of Illinois Evidence §406 (5th ed. 1990))). While this court, in *Bradfield v. Illinois Central Gulf R.R. Co.*, 137 Ill. App. 3d 19, 23 (1985), affirmed the rule embodied in Illinois Rule of Evidence 406 that habit evidence is always admissible to prove conformity on a particular occasion, the Illinois Supreme Court affirmed our decision on other grounds without commenting on the propriety of our decision to adopt it. See *Bradfield v. Illinois Central Gulf R.R. Co.*, 115 Ill. 2d 471 (1987). As a result, post-*Bradfield* appellate decisions took a variety of approaches, some only allowing evidence of careful habits in the absence of eyewitnesses and others requiring a strong necessity for the evidence before it would be admitted and specific corroborating instances as a foundation. See, *e.g.*, *Knecht v. Radiac Abrasives, Inc.*, 219 Ill. App. 3d 979, 987 (1991).

¶ 58 Despite the differing requirements stated in the case law, the committee comments characterize the adoption of Illinois Rule of Evidence 406 as an uncontroversial development with respect to the law of evidence in Illinois:

> "Rule 406 confirms the clear direction of prior Illinois law that evidence of the habit of a person or of the routine practice of an organization, *whether corroborated or not and regardless of the presence of eyewitnesses*, is relevant to prove that the

conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." (Emphasis added.) Ill. Rs. of Evid. Committee Commentary.

¶ 59 Having reviewed the testimony of Dr. Mitchell, Dr. Cumberledge, and nurse Hungate regarding their habits regarding taking and recording patient histories and Dr. Cumberledge's testimony regarding his habits in performing physical examinations of patients, we find that the testimony is proper habit testimony in that these witnesses described their invariably regular, semiautomatic methods. Thus, we find that their testimony was admissible without further foundation and that the circuit court did not err in allowing the testimony.

¶ 60 c. *Rule 213 Objections*

¶ 61 We now turn to the plaintiffs' argument that the circuit court committed reversible error in overruling their objections to testimony by Dr. Mitchell and Dr. Cumberledge that was not properly disclosed prior to the trial pursuant to Illinois Supreme Court Rule 213 (eff. Jan. 1, 2007). Specifically, the plaintiffs argue that the circuit court erred in admitting the following testimony that they claim forms the bases of the doctors' expert opinions on the standard of care which was not previously disclosed: (1) habit testimony from Dr. Cumberledge with respect to patient histories and physical examinations, (2) habit testimony from Dr. Mitchell regarding taking patient histories, and (3) Dr. Mitchell's testimony that the antibiotic he gave Mildred when she presented with an abscessed tooth on January 3, 2001, was for a therapeutic, rather than a prophylactic, purpose. We find no error.

¶ 62 Both Dr. Cumberledge and Dr. Mitchell testified as factual occurrence witnesses, and both gave opinions with regard to the standard of care. This court has addressed the standard of review for alleged violations of Illinois Supreme Court Rule 213 as follows:

"The admission of evidence pursuant to Rule 213 is within the trial court's discretion and will not be disturbed on appeal absent an abuse of that discretion. [Citation.] In

addition, the party challenging the admission of opinion testimony as a violation of Rule 213 must show some prejudice arising from the alleged error. [Citation.] Absent a showing of prejudice, the judgment need not be reversed on appeal. [Citation.] Where the undisclosed testimony is cumulative of other testimony, the opposing party is not prejudiced by its admission and a new trial is not warranted. [Citation.]" *Bauer v. Memorial Hospital*, 377 Ill. App. 3d 895, 914 (2007).

¶ 63 We recognize that a defendant physician in a medical malpractice action may be an "expert witness" for purposes of the rules governing disclosure and discovery of expert witnesses. *Karr v. Noel*, 212 Ill. App. 3d 575, 582-83 (1991) (interpreting prior Illinois Supreme Court Rule 220). Here, Dr. Cumberledge and Dr. Mitchell were entitled to present the challenged testimony to the extent that the testimony explained to the jury the facts surrounding the occurrences for which they were on trial. To the extent that this testimony also formed the bases for their opinions that they met the applicable standard of care, that testimony was cumulative of that of their retained experts. Accordingly, we find no prejudice and the circuit court did not abuse its discretion in allowing the testimony.

¶ 64 d. *Dr. Lentino*

¶ 65 The plaintiffs next argue that the circuit court erred in admitting the testimony of Dr. Lentino, who the plaintiffs assert was not qualified to testify to the standard of care because he previously defined the standard of care incorrectly in a deposition, stating that only willful misconduct violated the standard of care. The plaintiffs also argue that Dr. Lentino should not have been permitted to testify based on speculation that Dr. Cumberledge listened to Mildred's heart during his examination of her. Again, we find no error. Dr. Lentino correctly enunciated the standard of care during the trial as what a reasonably careful and well-qualified physician would do under the circumstances. The plaintiffs attempted to impeach Dr. Lentino's credibility during their cross-examination with his testimony in a deposition in

another case, which was taken out of context. In addition, Dr. Lentino testified regarding the basis for his opinion that Dr. Cumberledge met the standard of care, and the plaintiffs cross-examined him regarding the speculative nature of his assumption that Dr. Cumberledge listened to Mildred's heart in two places during his examination of her. The jury heard all of this during the trial and was the appropriate arbiter of Dr. Lentino's credibility. In addition, Dr. Lentino's standard-of-care testimony was cumulative of the standard-of-care testimony given by Dr. Ewart and, thus, was not unfairly prejudicial. See *Stennis v. Rekkas*, 233 Ill. App. 3d 813, 826 (1992).

¶ 66 e. *Special Verdict Form*

¶ 67 The next issue the plaintiffs raise on appeal is whether the circuit court erred in allowing a special verdict form to be issued to the jury on the issue of whether Dr. Cumberledge was an agent of MEDS. We consider this issue to be moot because the jury found no liability on the part of Dr. Cumberledge, we have found no error entitling the plaintiffs to a new trial against Dr. Cumberledge, and the liability of Dr. Cumberledge is not a subject of the plaintiffs' motion for a judgment *n.o.v.*

¶ 68 2. Judgment *N.O.V.* Regarding Dr. Mitchell's Liability

¶ 69 The final issue on appeal is whether the circuit court erred in denying the plaintiffs' motion for a judgment *n.o.v.* regarding the liability of Dr. Mitchell. The standard of review for a judgment *n.o.v.* has been described as follows:

> "A directed verdict or a judgment *n.o.v.* is properly entered in those limited cases where 'all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand.' [Citation.] In ruling on a motion for a judgment *n.o.v.*, a court does not weigh the evidence, nor is it concerned with the credibility of the witnesses; rather it may only consider the evidence, and any inferences therefrom, in the light most

favorable to the party resisting the motion. [Citations.] Most importantly, a judgment *n.o.v.* may not be granted merely because a verdict is against the manifest weight of the evidence. [Citation.]" *Maple v. Gustafson*, 151 Ill. 2d 445, 453 (1992).

¶ 70 In light of the standard of review, we cannot disturb the jury's verdict. As to the standard of care, the evidence was undisputed that, at the time of the events at issue, the standard of care required that a dentist update a patient's medical history if he has not seen that patient for a period of time and prescribe a prophylactic antibiotic if the patient reports a history of valvular problems. However, viewing the evidence in a light most favorable to Dr. Mitchell, as the standard of review requires, we find that a reasonable jury could find that Dr. Mitchell did update Mildred's history and that Mildred did not inform Dr. Mitchell of her valvular problems. Based on Mildred's testimony, the only change in her medical history that she can recall between 1987 and 1998 is that she smashed her finger while at work in 1993. Consistent with Dr. Mitchell's testimony that it is his habit to verbally update a patient's medical history if he has not seen a patient for a period of time and record in the patient's chart if any change is communicated by the patient, Dr. Mitchell's records indicate that Mildred smashed her finger at work.

¶ 71 A reasonable jury could find that Mildred's testimony at the trial indicated that she did not tell Dr. Mitchell about her heart condition. Mildred was diagnosed with a heart condition in 1998. In March 1999, when Mildred and Dr. Mitchell first discussed extracting her teeth, Mildred testified, and Dr. Mitchell's records reflect, that Mildred stated that she would have to check with her doctor, but she did not state that this was because she had a heart condition. A reasonable jury might have found that Mildred never believed she had a heart condition. Mildred did not recall Dr. Jacobs ever telling her that she had any congenital heart defect or long-term heart problem or that she needed to take any special precautions before she underwent medical or dental procedures. She testified that she did not see Dr. Jacobs after

1998, nor did she see any other doctor before the extractions, because she did not need to. She testified that during that time period, she thought her heart was "very good."

¶ 72 At the trial, Mildred testified for the first time that she told Dr. Mitchell of her heart condition before the extractions because her daughter Teresa told her to tell him. Teresa did not testify at the trial. Mildred was then impeached with her deposition testimony, where she stated that because she had not seen a doctor since 1998 and was not having any problems, she does not know why she would tell Dr. Mitchell about her heart condition. Mildred's answers to interrogatories were also in evidence, where she stated that she did not know of any statements made by any witnesses regarding her complaint. Mildred's daughter Winona was also impeached with her deposition testimony that Mildred never mentioned, at any time after contracting IE and up to the time of her deposition, that she had ever told Dr. Mitchell that she had a heart condition. Similarly, both Mildred's daughter Donna and Mildred's husband Lonnie testified that they do not recall Mildred ever telling them that she told Dr. Mitchell about her heart condition. A reasonable jury might have found Mildred's testimony that she did so to lack credibility.

¶ 73 In addition to the evidence of the breach of the standard of care, there is evidence in the record from which a reasonable jury could conclude that the plaintiffs failed to prove that it is more likely than not that a prophylactic antibiotic would have prevented Mildred from contracting IE and developing a mycotic aneurism. Dr. Lentino testified that based on the research he has performed, he has found no scientific proof that antibiotic prophylaxis is effective in preventing IE in patients with increased cardiac risk factors. Accordingly, it was Dr. Lentino's opinion, to a reasonable degree of medical certainty, that any alleged failure on the part of Dr. Mitchell to give Mildred antibiotic prophylaxis prior to her extractions could not be said to have, more likely than not, caused or contributed to cause her to contract IE. Dr. Lentino referred to Mandell's Textbook on Infectious Disease (Mandell's), fifth edition,

which was published in 2000 and is considered a premier reference. Mandell's reported that large controlled studies had been performed which showed marginal, if any, effectiveness of antibiotic prophylaxis prior to dental procedures. Mandell's further reported that the American Heart Association had collected and recorded samples of antibiotic prophylaxis failures between 1979 and 1982, revealing that those failures may not be rare and that the failures occur even if the infecting organism is susceptible to the antibiotic that was used.

¶ 74 Moreover, the plaintiffs' rebuttal expert, Dr. Pitchon, acknowledged that he has treated patients with IE where the disease occurred following dental procedures where antibiotic prophylaxis had been given. Dr. Pitchon agreed that antibiotic prophylaxis may prevent an exceedingly small number of cases of IE, if any, in individuals who undergo a dental procedure. Dr. Pitchon agreed that amoxicillin, the recommended antibiotic prophylaxis prior to dental procedures, does not eliminate all bacteria from the bloodstream. Amoxicillin may reduce the number of bacteria but will not eliminate bacteria. Finally, Dr. Pitchon testified that he did not think there was any way that he could tell directly, to a reasonable degree of medical certainty, whether antibiotic prophylaxis would have prevented Mildred's IE.

¶ 75 There was also evidence in the record to suggest that Mildred might have contracted IE sometime prior to the dental extractions. Dr. Lentino testified that Mandell's text reflects that it takes an average of 7 to 14 days for symptoms to develop from the time that a strep organism such as that found on Mildred's cultures enters the bloodstream. Based on the plaintiffs' testimony that Mildred's symptoms began between one and three days after the extractions, a reasonable jury could conclude, as did Dr. Lentino, that Mildred already had IE at the time of the extractions. Dr. Lentino testified that in his entire career in treating IE, he has never experienced the onset of the disease with a strep organism occurring within three days of the bacteremia.

¶ 76 Evidence in the record gave the jury a host of potential alternative ways in which Mildred could have had bacteria enter her bloodstream and cause IE prior to the extractions. The plaintiffs' dental expert, Dr. Baxter, testified that based on the records she reviewed, Mildred probably suffered from recurring decay prior to the extractions. Mildred also did not have routine checkups. Dr. Lentino testified that decayed teeth can make for a large bacterial load within the mouth. Additionally, bacteria enters a person's bloodstream multiple times a day, every day, as Mildred's subsequent treating dentist, Dr. Allen, testified. The plaintiffs' expert, Dr. Mathews, testified that Mildred might have had subacute IE, in which the infection occurs at the time the bacteria enters the bloodstream, but that it may take a long time, depending on the organism, until it becomes clinically evident. Dr. Middendorf testified that when bacteria attaches to a damaged heart valve, it takes some time for the patient to begin to develop symptoms of IE. All of this evidence could potentially support a jury's finding that Mildred's IE predated the extractions, and the jury was entitled to weigh any contrary evidence and gauge the relative credibility of all the evidence. For all of these reasons, we cannot conclude that the circuit court erred in denying the plaintiffs' motion for a judgment *n.o.v.* regarding their claims against Dr. Mitchell.

¶ 77 Finally, we note that the plaintiffs did not file a motion for a judgment *n.o.v.* regarding their claims against Dr. Cumberledge. However, we note that, based on all the evidence outlined above, there was ample evidence upon which a jury could reasonably conclude that Dr. Cumberledge did not breach the standard of the care, although he did not diagnose Mildred's IE at the time of her presentation to him, and that even if he had diagnosed Mildred's IE, that would not have changed Mildred's outcome. There was contradictory evidence regarding both of these elements, and it was within the jury's province to render its verdict.

¶ 78 CONCLUSION

¶ 79 For the reasons set forth above, the judgment of the circuit court of St. Clair County is affirmed, rendering Dr. Mitchell's cross-appeal moot.

¶ 80 Affirmed.