2012 IL App (3d) 110033-U

Order filed May 2, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

GEORGE W. CACKLEY, Special Administrator of the Estate of Joann Cackley, deceased,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellant,	)	
v.	)	
KEVIN PAULSEN, M.D.	)	Appeal No. 3-11-0033 Circuit No. 08-L-290
Defendant-Appellee	)	
(Peoria Surgical Group, Ltd. and Frank Radosevich,	)	Honorable Stephen Kouri,
Defendants).	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Carter and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court (1) committed reversible error by allowing defense counsel to cross-examine plaintiff's expert witness using a post-occurrence medical article that discussed the standard of care, (2) properly denied plaintiff the opportunity to cross-

examine defendant's expert with a medical article and another expert's deposition testimony, (3) properly limited plaintiff's rebuttal expert testimony to causation issues, (4) did not err in denying plaintiff's request to publish defendant's answer to the jury, (5) properly sustained defendant's objections during closing argument, and (6) did not err in submitting defendant's special interrogatory to the jury.

¶ 2 Plaintiff, George Cackley, filed an action against defendant, Dr. Kevin Paulsen, on behalf of his wife, Joann, alleging negligence in failing to properly monitor Joann's sleep apnea condition following surgery in 2001. A jury found in favor of defendant. On appeal, plaintiff argues, among other issues, that the trial court improperly allowed defendant to cross-examine his expert witness using medical guidelines reported in 2006. We find that the use of post-occurrence medical literature was prejudicial and remand for a new trial, but we affirm the trial court on the remaining claims of error.

¶ 3 Joann Cackley suffered from diabetes and hypertension. In 1995, she had a heart attack and underwent quadruple coronary bypass surgery. Shortly after her heart attack, Joann was diagnosed with obstructive sleep apnea. Sleep apnea is a condition where the patient has obstructed breathing during sleep. Her physician treated her condition with a continuous positive airway pressure (CPAP) machine. A CPAP machine is often used to correct the condition of sleep apnea by forcing air into the lungs while the individual sleeps.

¶ 4 In 1997, Dr. Robert Sparrow diagnosed Joann with chronic renal insufficiency and referred her to Dr. Paulsen for abdominal surgery. Following the operation, Paulsen ordered the administration of morphine as needed. Joann was lethargic for several days. Dr. Richard Lee, a neurologist, assessed her situation. He noted that Joann had sleep apnea and recommended the discontinuation of morphine. He also recommended that Joann use her CPAP machine. Within 24 hours, Joann's lethargy cleared.

¶ 5 In February of 2001, a colonoscopy revealed that Joann had a tumor in her colon. As a result, she was hospitalized a few weeks later for a sigmoid colon resection. Dr. Paulsen again performed the surgery. In preparation, Joann and her husband reminded Dr. Paulsen of Joann's sleep apnea condition and what occurred following her surgery in 1997. The parties discussed the use of Joann's CPAP machine.

¶ 6 Joann underwent surgery on March 2, 2001. After surgery, Dr. Paulsen prescribed morphine as needed. Joann had been given morphine during surgery. At approximately 5 p.m., hospital staff administered another 6 milligrams of morphine while Joann was still in recovery. She was then moved to her hospital room on another floor.

¶ 7 At 7:45 p.m., Joann suffered a full cardiopulmonary arrest. Her medical charts documented the event as a "respiratory arrest." She was resuscitated, intubated and moved to an intensive care unit. Joann experience significant neurological damage due to the lack of oxygen to her brain. She was later transferred to a nursing home and died on August 24, 2001.

¶ 8 In 2003, George Cackley filed suit against Dr. Paulsen, along with several other physicians, alleging medical negligence. In the complaint, plaintiff claimed that his wife suffered a respiratory arrest that was caused by, among other things, Paulsen’s (1) failure to recognize the respiratory suppressant effect that morphine administered during and after surgery would have on a sleep apneic patient, (2) failure to order the use of a CPAP device postoperatively, and (3) failure to place Joann in a monitored room for postoperative observation.

¶ 9 At trial, the primary issues were the standard of care that existed on March 1, 2001, for sleep apnea patients and causation.

¶ 10 Dr. Arthur Fox testified that he diagnosed Joann with sleep apnea in 1995. He also testified

that narcotics such as morphine have the effect of suppressing breathing, an effect that has been known for some time.

¶ 11 Dr. Lee, the neurologist who examined Joann in 1997, testified that Joann suffered from lethargy after her 1997 surgery as a result of the morphine she was given. He was asked to assess her condition five days after surgery. He charted that Joann appeared to be suffering from a metabolic type of lethargy secondary to her sleep disorder. He recommended the reduction or discontinuation of morphine and the use of a CPAP device at night. She recovered once the morphine was discontinued and she was given her CPAP machine.

¶ 12 On cross-examination by defense counsel, Dr. Lee testified that after completing his 1997 report, he was informed that Joann had been using her CPAP machine for several nights prior to his consultation. He stated that based on that information, he now believed the CPAP machine had little effect on her postoperative response.

¶ 13 Joann's husband testified that within hours after Joann's 2001 surgery, she was moved from surgery recovery to her room on the floor. There were no monitoring devices in her room, and she was not placed on her CPAP machine. Joann had a tube inserted through her nose to alleviate vomiting of stomach contents. Her breathing was regular but shallow. A few hours after the surgery, a nurse entered Joann's room to administer medication. As the nurse entered, Joann exhaled and then did not take another breath. The nurse immediately checked for a pulse and found none. The nurse said that something was wrong and called a code blue.

¶ 14 Dr. Jonathan Benumof, plaintiff's retained anesthesiology expert, testified in an evidence deposition that was read to the jury. Dr. Benumof was part of the American Society of Anesthesiologist (ASA) task force on perioperative management of obstructive sleep apnea. He,

along with several other physicians, approved the 2006 ASA "Practice Guidelines for the Perioperative Management of Patients with Obstructive Sleep Apnea."

¶ 15 According to Dr. Benumof, Joann experienced a respiratory arrest after the surgery. He testified that Dr. Paulsen failed to meet the standard of care by placing Joann in a room that was not monitored, given her high risk of respiratory failure. Benumof also testified that Joann should have been given her nasal CPAP.

¶ 16 Next, plaintiff called Dr. Mark Cooperman, a general surgeon. He also opined that Paulsen did not satisfy the standard of care. Dr. Cooperman believed that Joann's code blue was due to respiratory arrest secondary to her obstructive sleep apnea. He testified that the arrest was caused by the administration of morphine and the failure to order the CPAP device. He also testified that Joann should have been more carefully monitored, with particular monitoring as to the amount of oxygen in her blood.

¶ 17 On cross-examination, Dr. Cooperman testified that he had reviewed the 2006 ASA guidelines on the perioperative care of sleep apnea patients prior to testifying at trial. Defense counsel then used those guidelines to examine Dr. Cooperman regarding the effectiveness of various monitoring and treatment methods for postoperative patients with sleep apnea. Specifically, counsel referenced statements in the article addressing the insufficiency of literature on the efficacy of CPAP machines on a patient's postoperative respiratory status. Cooperman agreed that the guidelines stated that evidence of effectiveness was insufficient, but stated that he believed the article was contradictory.

¶ 18 On redirect examination, Dr. Cooperman was asked again about the contents of the 2006 ASA article, this time in support of plaintiff's position that a CPAP machine should have been

ordered. Cooperman stated that the article "strongly agreed that CPAP *** should be administered as soon as feasible after surgery to patients with OSA [sleep apnea] who were on it preoperatively." Plaintiff's counsel read statements from the article that provided "the consultants agree that continuous oximetry in a step-down unit or by telemetry reduces the likelihood of perioperative complications among patients who they believe are at increased risk of postoperative, perioperative risk from OSA." Dr. Cooperman testified that the recommendations made by the authors of the article contradicted the literature review statements contained in the same guidelines. In conclusion, Dr. Cooperman testified that he believed the standard of care in Peoria in 2001 was consistent with the article's recommendation that Joann should have been on a CPAP machine or in a monitored room following surgery.

¶ 19 Defendant's retained opinion witness was Dr. Douglas Aach, a general surgeon. He testified that Joann's treatment in 2001 met the standard of care. He testified that the postoperative records of Joann's vitals immediately after surgery indicated that oxygen was being supplemented to her and that she was gradually being weaned off the oxygen as she began to wake up. There was no indication that Joann was having difficulty coming out of the anesthesia. Her charts stated that she received an Aldrete score of "2" on the respiratory component, which is the highest possible postoperative recovery score. Nothing indicated that she needed to go to the intensive care unit or any heightened monitoring unit.

¶ 20 Dr. Aach testified that in his opinion, based on a reasonable degree of medical certainty, the standard of care did not require ordering a CPAP machine for Joann following her surgery. He testified that, in 2001, CPAP machines were considered an aid for people who had sleep apnea when they were sleeping and that the standard of care regarding the use of those machines postoperatively

was unclear. He stated that he could not find any surgical literature prior to 2001 that gave a directive or suggestion about safeguards for sleep apnea patients or the use of CPAP machines.

¶ 21 Dr. Aach opined that the arrest Joann suffered was not respiratory, but started in her heart. He based his opinion on the blood gas analysis of Joann, which indicated a normal level of carbon dioxide. He testified that if a person experiences a respiratory arrest, the levels of carbon dioxide in the blood should be higher than normal; one would also expect to see the heart continue to beat for a minute or so after the arrest. Those indicators were not present in Joann's case. He also based his opinion that she suffered cardiac arrest on Joann's history of heart and blood vessel disease. He testified that Joann had a high risk of experiencing a pulmonary embolism based on several risk factors, including the presence of cancer, an abdominal operation, obesity, and high blood pressure. He stated that a pulmonary embolism, small or large, can cause an arrhythmia of the heart, which can trigger a cardiac arrest.

¶ 22 During cross-examination, plaintiff's counsel attempted to question Dr. Aach about an article published in 1995 by the American College of Chest Physicians entitled "Nasal Continuous Positive Airway Pressure in the Perioperative Management of Patients With Obstructive Sleep Apnea Submitted to Surgery" (Chest article). Plaintiff's counsel also attempted to question Dr. Aach about his review of the deposition transcript of Dr. Jerome Klafta, the anesthesiology expert of former defendant Dr. Radosevich. The trial court granted defendant's objections and prohibited plaintiff from questioning Dr. Aach about the Chest article or Dr. Klafta's deposition.

¶ 23 On further cross-examination, Dr. Aach acknowledged that Joann's blood oxygen saturation levels were unknown shortly before her arrest because they were not being monitored. The last oxygen saturation level check was at 6:30 p.m., and it was normal. He admitted that none of Joann's

charts from that day indicated that the code blue arrest was a result of a pulmonary embolus.

¶ 24 Dr. Paulsen testified on his own behalf, claiming that he did not violate the standard of care in providing or ordering a CPAP machine. He testified that he had not seen any surgical literature, texts or continuing medical education courses prior to 2001 indicating that sleep apnea patients needed a CPAP device following surgery.

¶ 25 In rebuttal, plaintiff sought to publish portions of Dr. Paulsen's answer in which he indicated that he had insufficient knowledge with which to admit or deny allegations that he breached the standard of care. The court denied plaintiff's request.

¶ 26 Plaintiff also called Dr. Neil Thomas, a general surgeon, as an opinion witness. Over defendant's objection, the trial court allowed Dr. Thomas to testify as a rebuttal witness regarding causation but prohibited him from testifying about the standard of care.

¶ 27 Dr. Thomas stated that in his medical opinion the cause of Joann's arrest on March 2, 2001, was respiratory. He based his opinion on the patient's history of sleep apnea, obesity, having undergone a major procedure before and having some problems after that procedure, and knowing that she was on a CPAP machine continuously at home during sleep. He did not believe the arrest was caused by a pulmonary embolus because after such an event the patient is usually hypoxemic, which means the patient exhibits low blood oxygen levels. He testified that Joann's oxygen levels were normal.

¶ 28 During closing argument, plaintiff's counsel made several statements about the treating physicians and defendant's opinion witnesses. Specifically, plaintiff's counsel stated that Dr. Lee tried to "back off of" what he charted and that "there is no profession that circles the wagons more quickly." He also stated that "the experts that the plaintiff used in this case are from out of state.

There is a reason for that." Defendant's objections to these statements were sustained.

¶ 29 Over plaintiff's objection, the trial court gave the jury the following special interrogatory: "Is it more probably true than not that the arrest that the plaintiff's decedent suffered on March 2, 2001, was cardiac in origin?" After deliberating, the jury returned a verdict in favor of defendant and answered the special interrogatory in the affirmative.

¶ 30 I

¶ 31 *Use of Post-Occurrence Medical Literature*

¶ 32 Plaintiff argues that the trial court abused its discretion by allowing defendant to cross-examine his expert with ASA guidelines published five years after Joann's surgery.

¶ 33 A determination of the scope and extent of cross-examination of an expert witness rests in the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83 (1995). An abuse of discretion occurs where no reasonable person would take the view adopted by the court. *In re Leona*, 228 Ill. 2d 439 (2008). When a trial court abuses its discretion in presenting evidence to the jury, a new trial should be ordered if the evidence appears to have affected the outcome of the trial. *Troyan v. Reyes*, 367 Ill. App. 3d 729 (2006).

¶ 34 The cross-examination of an expert witness serves as the primary safeguard against erroneous expert testimony. *Sears v. Rutishauser*, 102 Ill. 2d 402 (1984). A medical treatise may be used in the cross-examination of an expert, but only if the treatise has been authenticated as a reliable authority by a witness with expertise in the area, or the trial court has taken judicial notice of the author's competence. *Wilson v. Humana Hospital*, 399 Ill. App. 3d 751 (2010); M. Graham, Cleary & Graham's Handbook of Illinois Evidence §§ 202.1, 703.1, 705.1, 705.2 (9th ed. 2009).

¶ 35 The rules of admissibility are more restrictive for post-occurrence medical literature. *Granberry v. Carbondale Clinic, S.C.*, 285 Ill. App. 3d 54, 60-66 (1996). Post-occurrence treatises and articles, even if properly authenticated, may not be admitted to show standard of care. *Nelson v. Upadhyaya*, 361 Ill. App. 3d 415 (2005) (use of post-occurrence literature to establish standard of care is irrelevant and highly prejudicial).

¶ 36 However, some courts have stated that post-occurrence literature may be used in cross-examination to prove causation. *Granberry*, 285 Ill. App. 3d at 60-66; *Bergman v. Kelsey*, 375 Ill. App. 3d 612 (2007). Those cases also allowed pre-occurrence literature to be used to show the diagnostic capabilities of a machine or device. *Granberry*, 285 Ill. App. 3d at 60-66; *Bergman*, 375 Ill. App. 3d at 631-32.

¶ 37 Here, defendant's use of the post-occurrence medical article in the cross-examination of Dr. Cooperman was improper for two reasons: (1) it was not properly authenticated; and (2) it addressed the standard of care.

¶ 38 First, the record does not indicate that the article was authenticated as a reliable source by an expert witness or that the trial court took judicial notice of it. See *Wilson*, 399 Ill. App. 3d at 758. In defense of his use of the article, defendant contends that a medical article or treatise does not need to be authenticated for purposes of cross-examination if the expert has reviewed the article. Defendant cites *Iaccino v. Anderson*, 406 Ill. App. 3d at 397 (2010) in support of his position. In *Iaccino*, the plaintiff argued that the trial court improperly allowed defense counsel to cross-examine the plaintiff's expert with medical literature. The appellate court held that cross-examination was proper because the plaintiff's expert had reviewed the article prior to cross-examination. *Iaccino*, 406 Ill. App. 3d at 408-09. The court relied on *Piano v. Davison*, 157 Ill. App. 3d 649 (1987), and

Jager v. Libretti, 273 Ill. App. 3d 960 (1995).

¶ 39 We disagree with *Iaccino*. The vast majority of cases state that an expert may only be cross-examined using a medical treatise that has been authenticated as a reliable authority by a witness with expertise in the area or by the court. *Wilson*, 399 Ill. App. 3d at 758; *Stapleton ex rel. Clark v. Moore*, 403 Ill. App. 3d 147 (2010); *Bowman v. University of Chicago Hospitals*, 366 Ill. App. 3d 577 (2006); *In re Estate of Dickens*, 161 Ill. App. 3d 565 (1987); and *People v. Johnson*, 206 Ill. App. 3d 875 (1990).

¶ 40 Furthermore, *Iaccino's* reliance on *Piano* and *Jager* is misplaced. Both of those cases involved the use of medical records of other physicians and the opinions contained therein, which our supreme court found were admissible as forming the basis of an expert's opinion because they are facts and data "reasonably relied upon by experts in the [medical] field." See *Wilson v. Clark*, 84 Ill. 2d 186 (1981) (adopting Rule 703 of the Federal Rules of Evidence). Medical records are reasonably relied upon to assist and document a patient's treatment.

¶ 41 Medical treatises, on the other hand, do not contain the same elements of reliability. They do not simply contain facts and data regarding a patient; they contain medical opinions and general recommendations based on a particular field of expertise. The primary concern in a trial setting lies in the likelihood that those opinions will be misunderstood or misapplied by the lay jury. See J.P. Lipton, *Rethinking the Admissibility of Medical Treatises as Evidence*, 17 Am. J. L. and Med. 209 (1991); see also *Lewis v. Stoval*, 272 Ill. App. 3d 467 (1994) (in Illinois, scientific and medical treatises are hearsay and inadmissable as proof of the statements contained therein). Accordingly, medical treatises and articles must be authenticated as a reliable source before they can be used for cross-examination of an opinion witness. See *Wilson*, 399 Ill. App. 3d at 758.

¶ 42 Second, although defendant argues that the article was employed only to prove causation, the article inevitably showed standard of care. Counsel's questions to the witness involved knowledge within the medical profession as to whether the use of a CPAP machine was beneficial or should have been required following surgery. In the ASA article, causation is inextricably tied to standard of care.[1] The article discusses whether a CPAP machine should be used and the effectiveness of the device on postoperative sleep apnea patients. It outlines that connection and then illustrates the subsequent developments in recommending an appropriate standard of care for sleep apnea patients. Thus, the trial court erred in allowing the 2006 ASA guidelines to be used in cross-examination.[2]

¶ 43 Having found that the trial court abused its discretion, we must determine if the outcome of

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[1] "The consultants strongly agree that CPAP or NIPPV should be administered as soon as feasible after surgery to patients with OSA who were receiving it preoperatively.

* * *

CPAP or NIPPV, with or without supplemental oxygen, should be continuously administered when feasible *** to patients who were using these modalities preoperatively, unless contradicted by the surgical procedure." American Society of Anesthesiologists Practice Guidelines, *Practice Guidelines for the Perioperative Management of Patients with Obstructive Sleep Apnea*, Anesthesiology, pp. 1086-1087, V. 104, No. 5, May 2006.

[2] We are uncomfortable with the reasoning in *Granberry* and *Bergman* allowing post-occurrence literature to be used to prove causation. In those cases, as in this one, causation and standard of care appear entwined, and difficult, at best, to separate. Although we need not reject those cases outright in light of our discussion here, we are troubled by their analysis.

the trial was affected. During Dr. Cooperman's testimony, the 2006 ASA article was read into the record and considered by the jury. Portions of the article state that there is insufficient literature to evaluate the effect of CPAP on the postoperative respiratory status of patients with obstructive sleep apnea. However, the article also recommends the use of a CPAP machine and monitoring devices to minimize the risk of respiratory arrest in postoperative situations. These seemingly conflicting statements could only serve to confuse the jury and allow it to be swayed by improper evidence of standard of care published five years after Joann's surgery. Since the error in this case may have affected the outcome, plaintiff is entitled to a new trial. See *Troyan*, 367 Ill. App. 3d at 732-33.

¶ 44 II

¶ 45 *Cross-Examination of Defense Expert Dr. Aach*

¶ 46 Plaintiff argues that it was highly prejudicial for the trial court to deny him the right to cross-examine defendant's expert about Dr. Klafta's deposition and the Chest article, both of which demonstrated that literature establishing the standard of care was available in 2001.

¶ 47 a. Dr. Klafta's Deposition

¶ 48 During cross-examination, plaintiff's counsel asked Dr. Aach whether he had reviewed the deposition of a former expert, Dr. Klafta. Through further questioning, counsel suggested that defense counsel intentionally withheld a 1997 medical article from Dr. Klafta's deposition so that Dr. Aach would be unable to answer any questions regarding it. Defendant objected. The trial court determined that it was "irrelevant" whether the article had been withheld and denied the use of Dr. Klafta's deposition.

¶ 49 We agree with the trial court's ruling. Dr. Klafta was an expert for a previously named defendant who had been dismissed from the case prior to trial. He was not listed on plaintiff's

witness list pursuant to Supreme Court Rule 213(f), and he did not testify at trial. We find no error in the trial court's decision to bar any reference to his deposition testimony. See Ill. S. Ct. Rs. 213(f), 213(g) (eff. July 1, 2008).

¶ 50 b. The Chest Article

¶ 51 Dr. Aach also testified to the following:

¶ 52 "Q: You are familiar with the Journal of CHEST are you not?"

¶ 53 A: I know of it, yes.

¶ 54 * * *

¶ 55 Q: It deals specifically with the topic that we are dealing with in this case, does it not?

¶ 56 A: It does.

¶ 57 Q: And it was written in 1995, wasn't it?

¶ 58 A: Correct.

¶ 59 Q: And while we are on the topic, before I move on, that article recommends use of a C-PAP?"

¶ 60 Mr. Pretorious: Your Honor, this is improper. I object to this.

¶ 61 * * *

¶ 62 The Court: Objection sustained. Go ahead."

¶ 63 The trial court properly sustained defendant's objection. A medical treatise may be used in cross-examination only if it has been properly authenticated as a reliable authority by an expert recognizing the treatise as such or by the trial court taking judicial notice of it. See *Wilson*, 399 Ill. App. 3d at 758. Here, the Chest article had not be authenticated as a reliable resource. Thus, we find no abuse of discretion in the trial court's decision denying the use of the article to argue the standard

of care.

¶ 64 III

¶ 65 *Dr. Thomas's Rebuttal Testimony*

¶ 66 Plaintiff argues that the trial court denied plaintiff the right to present rebuttal testimony regarding standard of care. He claims such testimony was necessary to respond to defendant's experts who refuted plaintiff's contention as to the applicable standard of postoperative care.

¶ 67 Rebuttal evidence is evidence that is produced to explain, recall, contradict, or disprove evidence given by the defendant. *People v. Nettles*, 107 Ill. App. 2d 143 (1969). Where a defendant introduces evidence of an affirmative matter in defense or justification, the plaintiff, as a matter of right, is entitled to introduce evidence in rebuttal as to that affirmative matter. *Pellico v. E.L. Ramm Co.*, 68 Ill. App. 2d 322 (1966). To be admissible, rebuttal evidence must either disprove an affirmative defense or meet new points raised by the defendant's evidence. *Affatato v. Jewel Corporation, Inc.*, 259 Ill. App. 3d 787 (1994). Defendant's evidence contradicting or opposing plaintiff's evidence does not constitute "new evidence" so as to allow rebuttal evidence. *Kurrack v. American District Telegraph Co.*, 252 Ill. App. 3d 885 (1993). A trial court has discretion to exclude cumulative evidence. *Hubbard v. Sherman Hospital*, 292 Ill. App. 3d 148 (1997).

¶ 68 Here, Dr. Thomas's proposed testimony regarding standard of care did not address any specific opinions rendered by defendant's expert that were not already expressed in plaintiff's case-in-chief. Plaintiff is unable to show any new or affirmative matter to which Dr. Thomas would have responded with any new testimony about standard of care regarding the use of a CPAP machine postoperatively. His rebuttal testimony would have done nothing more than reiterate the testimony of plaintiff's primary witnesses. Dr. Aach's testimony that the standard of care did not require a

CPAP machine merely contradicted what plaintiff's experts already claimed to be the standard of care. Thus, plaintiff was not denied the right to present rebuttal evidence contradicting a new issue. Accordingly, the trial court did not abuse its discretion when it limited Dr. Thomas's testimony to the issue of causation.

¶ 69 IV

¶ 70 *Request to Publish Defendant's Answer*

¶ 71 Next, plaintiff claims that defendant's statement in his answer that he had insufficient knowledge to either admit or deny certain allegations was a judicial admission that should have been published to the jury.

¶ 72 A response of insufficient knowledge with which to admit or deny does not constitute a statement in a pleading amounting to a judicial admission. *Marion v. Estate of Wegrzyn*, 93 Ill. App. 2d 205 (1968). Statements of a party opponent may be admitted when that party makes a contradictory statement at trial. *McNealy v. Illinois Central R.R. Co.*, 43 Ill. App. 2d 460 (1963).

¶ 73 Here, defendant's statements of insufficient knowledge in his answer did not contradict his testimony. At trial, Paulsen stated that he had sufficient knowledge of the events and testified accordingly. Although defendant's answer was not publishable, plaintiff was permitted to question defendant's credibility, and counsel did so. The trial court's ruling was proper.

¶ 74 V

¶ 75 *Objections During Closing Argument*

¶ 76 Plaintiff claims that it was error for the court to repeatedly sustain objections during his closing argument. He argues that in doing so, the trial court denied him the opportunity to argue reasonable inferences to be drawn from the facts at trial.

¶ 77 In closing argument, a party is allowed to discuss the evidence introduced and all reasonable inferences that may be drawn therefrom. *McDonnell v. McPartlin*, 192 Ill. 2d 505 (2002). Counsel may be vigorous and make fair comments on the evidence. *Augestein v. Pulley*, 191 Ill. App. 3d 664 (1989). However, the injection of personal beliefs and opinions is improper. *Manus v. TransStates Airlines, Inc.*, 359 Ill. App. 3d 665 (2005). In addition, while a party is entitled to argue reasonable inferences, counsel may not misrepresent the evidence, argue facts not in evidence, or "create his own evidence" during closing argument. *Tsoukas v. Lapid*, 315 Ill. App. 3d 372 (2000). We give considerable deference to the trial court on closing argument issues because the trial court saw the presentation of evidence and heard the arguments by counsel. Thus, the trial court is in a better position to assess the accuracy and prejudicial effect the arguments might have had upon the jury. *Manus*, 359 Ill. App. 3d at 671.

¶ 78 In this case, counsel's comments that the medical profession "circles the wagons" and that he had to hire experts from outside Illinois were not based on facts that were in evidence, nor were they based on any inference that could be drawn from the testimony of the witnesses at trial. Counsel's statements were an effort to inject personal beliefs into the trial. Thus, the trial court properly sustained defendant's objections.

¶ 79 VI

¶ 80 *Special Interrogatory*

¶ 81 Plaintiff argues that the trial court erred in giving defendant's special interrogatory to the jury.

¶ 82 A trial court's decision to give a special interrogatory is governed by section 2-1108 of the Code of Civil Procedure (735 ILCS 5/2-1108 (West 2008)), which provides:

> "Unless the nature of the case requires otherwise, the jury shall render a general verdict. The jury may be required by the court, and must be required on request of any party, to find specially upon any material question or questions of fact submitted to the jury in writing. Special interrogatories shall be tendered, objected to, ruled upon and submitted to the jury as in the case of instructions." 735 ILCS 5/2-1108 (West 2008).

A special interrogatory is in the proper form if (1) it relates to the ultimate issue of fact upon which the rights of the parties depend, and (2) an answer responsive thereto is inconsistent with some general verdict that might be returned. *Northern Trust Co. v. University of Chicago Hospitals and Clinics*, 355 Ill. App. 3d 230 (2002). A special interrogatory that is repetitive, misleading, confusing, or ambiguous is improper. *Blakey v. Gilbane Building Corp.*, 303 Ill. App. 3d 872 (1999). A trial court has no discretion but to submit to the jury a special interrogatory requested by a party so long as it is in the required form. 735 ILCS 5/2-1198 (West 2008); *Northern Trust Co.*, 355 Ill. App. 3d at 251.

¶ 83 At trial, plaintiff alleged that defendant's failure to order the postoperative use of a CPAP machine and place Joann in a monitored room led to her respiratory arrest that then developed into a full cardiopulmonary arrest. In his defense, Paulsen argued that Joann experienced a cardiac arrest, which then led to respiratory arrest. Defendant argued that Joann's arrest was caused by a pulmonary embolus that was unrelated to Joann's sleep apnea condition. In light of these opposing theories, defendant requested a special interrogatory that asked whether cardiac arrest, as opposed to respiratory arrest, was the underlying primary precipitating event that led to Joann's injuries.

¶ 84 Based on the evidence presented at trial, Joann's arrest could not have resulted from an act

or omission by defendant if the jury determined that the origin of the arrest was cardiac, rather than respiratory. This was an ultimate fact to be determined in the case and an affirmative answer to the interrogatory would be inconsistent with a general verdict in favor of plaintiff. Thus, the special interrogatory was in the proper form, and the trial court was required to give it.

¶ 85 CONCLUSION

¶ 86 The judgment of the circuit court of Peoria County is affirmed in part, reversed in part and remanded for a new trial.

¶ 87 Affirmed in part and reversed in part; cause remanded.