

Count I alleges a violation of section 3-601 of the Nursing Home Care Act (210 ILCS 45/3-601 (West 2004)), count II alleges wrongful death, and count III alleges wilful and wanton conduct. Counts IV, V, and VI make the same allegations as in counts I, II, and III, but are directed against HSM. Count VII, directed against Rosewood, and count VIII, directed against HSM, allege negligent hiring and/or retention of Donna Graham, the nurse who administered the medication to Blanche.

¶ 3 Rosewood admitted a medication error occurred in that Donna administered an unscheduled dose of OxyContin, a controlled-release oral formulation of oxycodone indicated for the management of moderate to severe pain, but argued that such error was not the cause of Blanche's death. A jury trial was conducted between December 3, 2007, and December 11, 2007, after which the jury returned a verdict in favor of defendants. Judgment was entered on the verdict. Plaintiff filed a timely posttrial motion, arguing that the verdict was against the manifest weight of the evidence and was a result of defense counsel's misstatements of evidence, facts, and the law. Plaintiff claimed that due to the cumulative effect of error, she was denied a fair trial. The trial court agreed and granted plaintiff a new trial.

¶ 4 Pursuant to Supreme Court Rule 306(a)(1) (eff. Sept. 1, 2006), defendants filed a petition for leave to appeal to this court. Initially, we denied the petition for leave to appeal; however, in the exercise of its supervisory authority, our supreme court directed us to vacate our order denying the petition for leave to appeal and to enter an order allowing the petition for leave to appeal and to consider the matter on the merits. *Metz v. Rosewood Care Center, Inc.*, 234 Ill. 2d 525, 917 N.E.2d 522 (2009) (supervisory order). Thereafter, we entered an order granting the petition for leave to appeal. Defendants' petition and plaintiff's answer were allowed to stand as briefs. Oral arguments were heard. The two issues raised in this appeal are: (1) whether the trial court abused its discretion in granting plaintiff a new trial

and (2) whether the trial court abused its discretion in refusing to strike plaintiff's exhibits submitted in support of plaintiff's posttrial motion. We reverse.

¶ 5

FACTS

¶ 6 During the summer of 2005, Blanche, age 86, lived alone in Township Village, a retirement community in East Alton; however, after a series of unexplained falls, Blanche was admitted to Alton Memorial Hospital on July 6, 2005. During her 10-day stay in the hospital, Blanche was found to be hyponatremic and treated with demeclocycline. A small nodule was discovered in her left adrenal gland and was considered a potential source of antidiuretic hormone and a possible cause of her low serum sodium (hyponatremia). Blanche was discharged to Rosewood on July 16, 2005, with the hope that she could be rehabilitated and return home.

¶ 7 Throughout August 2005, Blanche complained of back pain and was ultimately diagnosed with a lumbar compression fracture. Plaintiff became increasingly concerned about Blanche's complaints of back pain and was trying to determine whether there was some type of surgical procedure that might alleviate her mother's pain. At age 86, Blanche also had some other conditions, most notably, congestive heart failure.

¶ 8 On August 26, 2005, Blanche was transferred from Rosewood to Alton Memorial Hospital because of back pain. Blanche returned to Rosewood at approximately 6 p.m. with physician's orders for 20 milligrams of OxyContin every 12 hours. Prior to leaving the hospital, Blanche received a 20-milligram dose of OxyContin at approximately 4:05 p.m.

¶ 9 Donna was the nurse on duty who cared for Blanche upon her return to Rosewood. Donna is a licensed practical nurse with approximately 30 years of experience. A substantial amount of time during the eight-day trial was spent on evidence regarding the hiring practices of Rosewood and attempting to show that Donna should not have been hired and that she had a history of bad performance and terminations. Illinois Department of Public Health

(Department) officials testified about their investigation into the matter. The Department cited Rosewood for a medication error in this matter.

¶ 10 Donna was hired by Rosewood in June 2005. Donna filled out an application on June 20, 2005, was interviewed on the same day, and was hired on the spot, with the condition of checking her references. Donna had previously worked at other nursing homes in the area. Prior to her employment with Rosewood, Donna worked at Maryville Manor, where, by her own admission, she was the subject of discipline. She was employed at the Collinsville Care Center for approximately five or six months prior to her employment with Maryville Manor. Donna testified that she was not subject to discipline or reprimand during her tenure with Collinsville Care Center, but she was nevertheless terminated from that job. Prior to that, Donna worked at Colonial Care for a little over a year. She said she left that job because of "[b]ad conditions." She ultimately left her employment at Rosewood on October 27, 2005. According to Donna, she had secured other employment as a nurse prior to leaving Rosewood. At the time of trial, Donna was living in Georgia.

¶ 11 On the date of Blanche's death, Donna was working from 2 p.m. until 10 p.m. At approximately 6 p.m., the ward clerk, Angela, notified Donna that Blanche had returned from the hospital. According to Donna, a ward clerk intercepts all the transport papers from the hospital or the facility from where a patient is coming and makes notations about medication orders. At approximately 6:30 p.m., Donna made a notation on Blanche's chart after checking on Blanche. She noted that Blanche was alert and oriented, but still complaining of back pain. Donna did not believe Blanche's pain was any better than before she went to the hospital. Later in the evening, plaintiff was concerned about Blanche's pain and asked Donna whether her mother could receive any medication for pain.

¶ 12 Plaintiff denied that she asked Donna to administer pain medication on the evening of August 26, 2005. Plaintiff testified that she returned with Blanche back to the nursing

home around 6 p.m. Later in the evening, she talked to Donna and told her that her mother "was starting to get some back pain." Plaintiff testified she left the nursing home around the time it started to get dark.

¶ 13 Donna testified that Blanche was in severe pain and actually crying out and hollering. After checking Blanche's medication record, Donna determined that Blanche could receive 20 milligrams of OxyContin at 8 p.m. At Rosewood, medications are normally administered at 8 a.m. and 8 p.m. The Rosewood records indicate that Blanche was administered another dose of OxyContin at approximately 8:15 p.m. Donna did not know that Blanche had been given 20 milligrams of OxyContin at the hospital at 4:05 p.m., as the medication order which accompanied Blanche from the hospital failed to state when and if OxyContin had been administered.

¶ 14 Prior to leaving for the evening at the end of her shift at 10 p.m., Donna checked on Blanche. Donna recalled checking on Blanche at approximately 10:15 p.m. Donna clocked out at 10:58 p.m. Blanche was able to communicate with Donna and said her back was feeling better. Donna did not notice any decreased rate of respirations. The nurse who worked the shift following Donna's was Russell Smith. Donna and Russell discussed Blanche's condition prior to Donna leaving for the evening. Donna advised Russell that Blanche had been to the hospital earlier in the day, and she informed him of the medications Blanche was to receive. Donna testified that she would not have given Blanche 20 milligrams of OxyContin if the ward clerk had put a hold order or noted that Blanche should not receive the OxyContin for 12 hours after it was administered.

¶ 15 Russell testified that Donna reported to him that Blanche was experiencing back pain and went to the hospital in an attempt to get some relief, but returned from the hospital and was still experiencing pain. The physician's order sheet from Alton Memorial Hospital read as follows:

"August 26th, '05 at 15:50. Transfer back to Rosewood. Hold physical therapy. Up with one assist.

Oxycontin 20 milligrams p.o.q. twelve hours. Percocet 5/325 two p.o.q. six hours p.r.n. pain. Schedule bone scan of lumbar spine for 8/29/05 at Anderson Hospital. Morphine eight milligrams and Phenergan 25 milligrams. I.n.q. four hours p.r.n., severe pain."

This was followed by a doctor's signature. Russell pointed out that the order sheet failed to state when the last dose of OxyContin was given in the emergency room. Russell could not recall if Donna told him anything about Blanche's medication order.

¶ 16 Russell recalled that Blanche's room was at the end of the hall. He checked on the other residents and made it to Blanche's room around 11:30 p.m., at which time he found Blanche lying in her bed with her mouth open and having a difficult time breathing. He said her breathing was "labored" and he knew she needed help. He called for a crash cart. Other nurses responded. At some point, Blanche stopped breathing, and CPR was started on Blanche. A 9-1-1 call was placed and emergency medical technicians responded. Blanche was transported to the hospital where she was pronounced dead at 12:37 a.m. on August 27, 2005. Plaintiff was notified of her mother's death.

¶ 17 The Madison County coroner's office requested Dr. Raj Nanduri perform an autopsy. Dr. Nanduri testified that she performed the autopsy on August 27, 2005, at 2:15 p.m. Dr. Nanduri could not recall specifically how long this autopsy took, but testified that in general an autopsy takes two hours. She took blood, urine, and eye fluid samples during the autopsy. The draw site of the blood was not listed, but according to Dr. Nanduri, if the draw site is not listed, it is ordinarily obtained from the heart. A partially digested pill was found in Blanche's stomach, which later was determined to be OxyContin. The fluid samples were sent for testing to Dr. Long, a forensic pathologist.

¶ 18 After receiving Dr. Long's report, Dr. Nanduri determined Blanche's cause of death to be acute toxicity of oxycodone and opiates. Dr. Nanduri testified that anywhere from .04 to 2.7 micrograms per milliliter could be considered toxic and such a variable means that for some people .04 might be toxic whereas for others it is as high as 2.7. For some, 2.6 micrograms per milliliter might not be lethal. It depends on many factors, including whether a person is taking the drug regularly and develops a tolerance to the drug. During the autopsy, Dr. Nanduri also discovered that Blanche was in poor health and had substantial heart problems. Her heart was morphologically abnormal with septal fibrosis and left ventricular hypertrophy. Two grafts to her coronary arteries were evident, the posterior fully occluded and the anterior 80% occluded. Dr. Nanduri testified that if Blanche had not died from toxicity, she could have died from her heart condition.

¶ 19 Dr. Long was contacted by the Madison County coroner's office and asked to perform the analyses on the samples taken during Blanche's autopsy. Dr. Long is not a medical doctor; he holds a Ph.D. in toxicology. The following postmortem blood concentrations were found in the blood sample: ethanol 0.015 milligrams per deciliter; propoxyphene 0.43 micrograms per milliliter (mcg/ml); oxycodone 1.3 mcg/ml; morphine (total) 0.27; hydrocodone (total) 0.15 mcg/ml; dihydrocodeine less than 0.05 mcg/ml; acetaminophen 19 mcg/ml; and promethazine 0.31 mcg/ml. Dr. Long opined that the 1.3 oxycodone level in Blanche was fatal, but he could not say whether the other drugs present in Blanche, given her age and health condition, would not be fatal if the oxycodone was not present.

¶ 20 Dr. Long testified it is risky to depend on postmortem blood analysis because volume distribution of drugs is unreliable postmortem. He explained that when a person dies, there are immediately multiple changes to the body. Drugs that are bound up in red blood cells are released upon death, so blood concentration levels are artificially elevated. He also noted that once a person dies, there is no more energy in the body to maintain the drugs in tissue,

so the drugs come pouring out into the blood. According to Dr. Long, the "Society of Forensic Blood Toxicologists" came out with a position paper against postmortem analysis, and he cited a case in which an individual had ingested 20 milligrams of aspirin, but after doing an equation postmortem it was determined that the deceased would have had to consume 60 bottles of aspirin in order to have the elevated amounts that were found in his blood, which Dr. Long described as "completely ridiculous."

¶ 21 Dr. Long opined that neither the timing of the clinical observations nor the amount of oxycodone found in Blanche's postmortem blood is consistent with the administration of OxyContin 20 milligrams as charted in the medical records. He would expect two pills of 20 milligrams of OxyContin to have less than the 1300 nanograms per milliliter found in Blanche's blood. Dr. Long believed that Blanche consumed a third OxyContin pill, despite there being no notations in the medical record of such an occurrence. Dr. Long's assumption was based upon a notation on Blanche's medical records at approximately 9 p.m. which stated: "Guest complained of nausea, small amount of emesis. Medication given." Blanche's records indicate that Phenergan was ordered by the hospital physician in the case of nausea.

¶ 22 Dr. Long admitted that the autopsy showed that Blanche had substantial heart problems. He said that if Blanche had not died from drug toxicity, she could have died from her heart condition.

¶ 23 Plaintiff's expert, Dr. Stefan Kruszewski, a board-certified psychiatrist, testified that one of his major interests is addiction medicine. He became familiar with OxyContin because it is highly addictive. He charges \$375 per hour and estimated his charges in this case at \$32,000. He reviewed Blanche's hospital records, medical records, the records from Rosewood, the autopsy report, the death certificate, the coroner's report, and Donna's and Russell's depositions. Dr. Kruszewski opined that Blanche died as the result of a medical error in that she received too much OxyContin, leading to opioid and oxycodone intoxication,

which caused problems with her breathing and ultimately suffocation.

¶ 24 Dr. Kruszewski explained that oxycodone is a single-release entity, but OxyContin has a biphasic release in which the oxycodone contained therein is first released at approximately .6 hours after ingestion with a second release approximately 6.9 hours after ingestion. So rather than the drug level going up and coming back down fairly quickly, OxyContin goes up and the level stays up. OxyContin is oxycodone, but it differs because of the release mechanism in the pills. He explained that different populations absorb OxyContin differently. For example, people over 70 years of age have a decreased metabolism for drugs, and, therefore, in performing his analysis he increased the plasma concentration by 25% because Blanche was over 70. Likewise, women metabolize the drug differently than men and Blanche's advanced age would also have changed the metabolic function. Dr. Kruszewski stated that overall "in this case metabolic dysfunction increases the plasma concentration for someone like [Blanche] a minimum of fifty percent." In his estimation, this meant that the plasma concentrations would double in Blanche so that, at its peak, OxyContin would go from 40 nanograms to 70 or 80.

¶ 25 Dr. Kruszewski explained the signs and symptoms of overdosing from OxyContin as "[s]edation, increased somnolence, delirium, seizures, coma, obtundation, unconsciousness. The biggest problem, however, among all of the preceding death is asphyxia and respiratory depression." He concurred with the final listed cause of death on the coroner's report of acute oxycodone and opiate toxicity.

¶ 26 On cross-examination, Dr. Kruszewski admitted that he is not a toxicology expert, that Blanche was not being treated by a psychiatrist, and that there was no issue in this case concerning drug abuse or addiction. Dr. Kruszewski also admitted that he has never prescribed OxyContin and also that the level of OxyContin prescribed in this case of 20 milligrams was reasonable in light of the fact that Blanche was an opiate-tolerant person and

was complaining of severe pain. Dr. Kruszewski agreed that Blanche had multiple medical conditions.

¶ 27 Dr. Kruszewski testified that Blanche was gasping for air when Russell checked on her; however, after reviewing Russell's testimony, Dr. Kruszewski stated, "I will have to stand corrected." Dr. Kruszewski admitted that Russell actually testified that Blanche had "labored breathing." Dr. Kruszewski prepared charts as to the levels of OxyContin in Blanche at various times. He agreed with defense counsel that if the second pill had not been fully digested and thus not fully absorbed into Blanche's bloodstream, the expected level of blood concentration of OxyContin demonstrated on Exhibit 72A at just under 70 nanograms per milliliter at its peak at 9:30 p.m. would actually be lower. Dr. Kruszewski testified that his graphic estimates were "not meant to be specific for [Blanche] and the time characterizations." He stated, "It's in the ballpark that explain and justify my conclusions."

¶ 28 Dr. Kruszewski admitted he is not qualified to discuss postmortem redistribution, but after his deposition he started looking into this phenomenon. He could not name one medical periodical or treatise he relied upon, but said he surfed the Internet to get information on postmortem redistribution. He said all of his assumptions with regard to Blanche's level of OxyContin hinge on the assumption that postmortem test results are valid. He said that before adjustments were made, the autopsy results showed that the level of OxyContin was 20 times higher than what pharmaceutical data from the manufacturer said it should be. Even after making adjustments for age, sex, and metabolic dysfunction, the results were still 13 to 15 times higher.

¶ 29 Defendants' expert, Dr. Henry Simmons, holds an M.D. from the University of Arkansas and a Ph.D. in toxicology. He is board certified in toxicology, family practice, and emergency medicine. As a consultant in this case, he charged \$350 per hour and testified that at the time of trial he had billed defendants approximately \$13,000. Dr. Simmons reviewed

the same reports as Dr. Kruszewski, but also visited Rosewood and interviewed the staff in preparing for this case.

¶ 30 Dr. Simmons testified that OxyContin is a sophisticated drug that contains two reservoirs of oxycodone. The first reservoir releases fast for quick relief, while the second releases slower in order "to maintain a relatively high constant rate." He explained that the pill remains intact for hours and does not quickly fall apart because it is meant to work for 12 hours. He testified that a single dose of 20 milligrams of OxyContin would produce 20 nanograms per milliliter or 0.02 micrograms per milliliter in a person's blood. He testified that a second dose of 20 milligrams administered four hours later would cause the level in the blood to almost double to just under 40 nanograms per milliliter or 0.04 micrograms. Dr. Simmons explained that this 40-nanogram level did not take into consideration other factors that needed to be considered such as Blanche's advanced age, sex, and renal function. Overall, however, he agreed with Dr. Kruszewski's estimate that the maximum blood level of oxycodone in Blanche would have been just under 70 nanograms per milliliter with the two doses of OxyContin which she received.

¶ 31 Dr. Simmons agreed that Blanche was "medically compromised." Defense counsel asked how Blanche was compromised, and Dr. Simmons responded: "Well, she's got 86 years of wear and tear. She had heart disease. She had disease in her kidneys." Plaintiff's counsel objected on the basis of a pretrial motion *in limine* which was argued at great length. Prior to trial, the trial court limited any discussion of Blanche's prior illnesses unless a causal connection could be made between the illness and her death via expert testimony and to discussion of Blanche's heart. The trial court sustained the objection and warned defense counsel he was "very close" and he should "be very careful." Prior to trial, plaintiff filed a motion to bar and in the alternative strike certain testimony of Dr. Simmons. This motion was denied.

¶ 32 Defense counsel then asked if Dr. Simmons was familiar with congestive heart failure. Dr. Simmons replied that he was very familiar with the condition and described it as follows: "Congestive heart failure, Folks, is a situation where the heart, which is supposed to work like a pump, doesn't pump as well as it should." The trial court then interjected: "Now, my ruling was you can talk about her heart, but I think that's enough. There was a motion heard and argued at great length, so you're not going to get it in the back door." The following colloquy then ensued between defense counsel and Dr. Simmons:

"Q. [Attorney for defendants:] Doctor, can you do this for me? Did you consider, as part of your review in this case, the clinical picture as it related to [Blanche] that was taking place on August 26th of '05?

A. Absolutely. You can't talk about a toxic effect without thinking about somebody's body because it affects lots of different organs. It's not an isolated event.

Q. Okay. Well, Doctor, much has been made in this case about the blood level of oxycodone at autopsy according to a test that Doctor Long's office performed.

A. Yes, sir.

Q. Okay. Why is that test result not good enough for everybody to cling to in an effort to determine what happened with regard to [Blanche]?

A. Well, in a nutshell, it's simply not what you would expect from what we see in the record clinically. It's high. It lies within a range that has been associated with fatalities caused by oxycodone; but at the same time, it's not what we would expect from the amount of oxycodone that was taken or that's charted, 20 milligrams at [4 p.m.] 20 milligrams at [8 p.m.]"

Dr. Simmons then went on to explain that the events that transpired the evening before Blanche's death did not fit within the pattern of what you would expect to occur in the event of an overdose.

¶ 33 Dr. Simmons noted that Blanche was alert, awake, and oriented at both 9 p.m. and 10 p.m., and was even able to have a conversation at 10 p.m., and that even around 11:50 or 11:55 p.m., she was still moving air, "still moving gas in and out of her lungs." Dr. Simmons testified: "That suggests that [Blanche's] ability to breathe or the sense that she needs to breathe has not been dramatically depressed by oxycodone because oxycodone takes away the body's sense that it needs to breathe. So it doesn't fit."

¶ 34 Dr. Simmons further testified that Blanche's postmortem oxycodone levels were "quite a bit higher than what [he] would have anticipated." He pointed out that Dr. Kruszewski estimated Blanche's levels to be at around 68 nanograms per milliliter, which was much lower than the 1300 nanograms per milliliter found. He testified it was 19 times higher than what would have been anticipated. Dr. Simmons then explained that the levels should have been even lower, given the fact that an OxyContin pill was still found intact in Blanche's stomach during the autopsy, which would mean that the pill had not even delivered its full dosage.

¶ 35 Dr. Simmons disagreed with Dr. Long's contention that Blanche consumed a third OxyContin pill and said there was nothing in his review of the records to suggest a third dose, and "[i]n fact, everything [Dr. Simmons] saw in the record would actually operate to the contrary." Dr. Simmons also testified at length concerning postmortem redistribution. Even assuming *arguendo* Blanche reached the highest concentration, there should have only been 300 to 359 nanograms per milliliter, not the 1300 found in Blanche. He said that in his opinion there was a conflict between the level of oxycodone at autopsy and the clinical picture of what was occurring with Blanche and that the "level is not what [he] would anticipate from two twenty milligram OxyContin tablets, one at [4 p.m.], one at [8 p.m.]" Dr. Simmons went onto explain:

"Given that level, you know, if [Blanche] had died of oxycodone toxicity, I would

have expected her to be most symptomatic at or about the time when the levels would have been at their maximum. That would have been around [9 to 10 p.m.]

Furthermore, along with the OxyContin, the levels of morphine, hydrocodone and Phenergan that she had gotten earlier in the day, those would have also been higher at that time. Those should have made it even more likely that she would have been seriously intoxicated and clearly and evidently intoxicated around nine or ten o'clock."

¶ 36 Dr. Simmons also testified, contrary to Dr. Kruszewski, about an oxycodone-induced death causing pain and suffering. While Dr. Kruszewski analogized an overdose to drowning, Dr. Simmons testified that he would not expect anything like that to occur and he has actually treated a number of people with opioid overdoses. He has never seen a person overdosing on oxycodone fight like they were drowning. He testified that what normally occurs in the case of an overdose is a "reduction of anxiety, this reduction of pain, this sleepiness gets much more intense. They pass into a deep sleep, lapse into coma. And they simply stop breathing because their body doesn't know that it needs to breathe anymore." He pointed out that Blanche was still breathing when Russell checked on her.

¶ 37 He testified that if a person is suffering from opioid toxicity, there are antidotes such as naloxone and naltrexone, but ventilation is also a proper response, just simply moving air in and out of a person's lungs, which is what Russell's response was here. According to Dr. Simmons, the fact that Blanche could not be resuscitated with the crash cart is another indication that she did not die from opioid toxicity. Dr. Simmons did not form an opinion as to the actual cause of Blanche's death, but, based upon his education, experience, and expertise in the fields of medicine and toxicology, opined that Blanche's death was not the result of a 20-milligram OxyContin tablet administered at 4 p.m. and another 20-milligram OxyContin tablet administered at 8 p.m. He determined there were "other things that very easily could have happened to [Blanche] that are more compatible with the clinical picture."

¶ 38 On cross-examination, Dr. Simmons stated that he would have preferred Dr. Nanduri draw the blood from the groin area rather than the heart because normally a heart draw has a higher concentration. Plaintiff's counsel specifically asked Dr. Simmons, "[W]hat is pulmonary edema?" Dr. Simmons responded that it "is a condition that occurs when fluid backs up in the lungs. Basically the heart can't clear the lungs of fluid, and fluid gets out into the lungs between the cells and the air sacs." Dr. Simmons said this condition was found in Blanche during the autopsy and said it was a condition that is consistent with congestive heart failure, but admitted that pulmonary edema is also consistent with an overdose of OxyContin.

¶ 39 Defense counsel specifically asked Dr. Simmons about a laboratory error when he asked: "Other than your opinions that you've expressed today. I mean in terms of there being a laboratory error, you didn't take exception to anything in there." Dr. Simmons admitted that he found no methodology or lab error in the testing performed by Dr. Long, but nevertheless stated that the toxicology results are "basically inconsistent with the clinical record." Plaintiff's counsel asked Dr. Simmons whether he was prepared to say "that based upon a reasonable degree of medical certainty that there was such an error." Dr. Simmons replied: "No. Absent any evidence that the lab was wrong, I can't. It would be speculation. It's just simply inconsistent." Dr. Simmons agreed that at least some of the inconsistency could be attributed to postmortem redistribution.

¶ 40 Dr. Simmons admitted that he could not say within a reasonable degree of medical certainty that Blanche died from congestive heart failure, but he said he "simply can't exclude it" as a possibility. He also said that he could not "exclude a death related to oxycodone," but found it "indeterminate because of the lack of consistency in all the data [he] looked at." Dr. Simmons agreed that the Society of Forensic Toxicologists does not support the use of postmortem redistribution analysis and said, for that reason, he did not perform such an

analysis in this case.

¶ 41 On redirect, Dr. Simmons testified: "I never made any attempt whatsoever to calculate the ante mortem, prior to death blood level, from the post mortem. I never used volume distribution." Dr. Simmons testified that if Blanche were to have died from an opioid overdose, it would have occurred at around 9:30 p.m., not midnight, based upon the drugs that were charted and the time they were taken. With regard to pulmonary edema, Dr. Simmons pointed out that Blanche had been hospitalized just a month prior to her death and she had congestive heart failure at that point.

¶ 42 During closing arguments, plaintiff asked for a verdict in excess of \$15 million: \$600,000 for pain and suffering; \$2 million for loss of society; and \$13 million for punitive damages. Defendants replied in closing that the Lakin Law Firm was seeking "jackpot justice" by asking for over \$15 million for the loss of an 86-year-old woman who died from natural causes. Defense counsel specifically told the jurors they were allowed to use their common sense and if they did so, it would result in a defense verdict. Defense counsel admitted that a medication error occurred but that the improperly administered second dose of 20 milligrams of OxyContin, the second lowest dosage on the market, did not cause Blanche's death. Defense counsel pointed out that the whole issue in the case was whether the medication error caused Blanche's death. If the jury decided it did not, then the charting issues and the hiring and policy issues of Rosewood and HSM would be irrelevant.

¶ 43 Defense counsel also argued that everyone agreed that the toxicology results showing 1300 nanograms of oxycodone were substantially higher than would be expected with the dosage received and that an explanation for such a high concentration was that the decimal point was put in the wrong place and if that were the case, "we have .13 micrograms instead of 1.3, then instead of 1,300, you have 130. Now, is 130 nanograms fatal? It's not." Plaintiff did not object. In fact, plaintiff only made two objections during the entire closing argument.

One objection was overruled and one was sustained.

¶ 44 During rebuttal, plaintiff's counsel specifically addressed the argument of an improperly placed decimal point. Plaintiff's counsel argued that defense counsel could have had the sample tested if he thought the decimal point was not in the proper place, but failed to do so. Defense counsel objected on the basis that he did not have the burden of proof in this case and did not have to prove anything. The trial court overruled the objection, and plaintiff's counsel went on to argue that the test results were accurate and they showed levels of 1.3 milligrams of oxycodone. He then specifically stated:

"Then the burden shifts to them to prove that it's not right, and they didn't meet that burden. They didn't bring anybody in here to tell you. If they would have, you would have heard it from there, and the reason why they didn't is because they know it's just like he said throw it up against the wall and hope that just one of you, just one of you grabs onto it. "

Plaintiff's counsel also rebutted defendants' assertion about jackpot justice, asserting that defense counsel was pandering about all the publicity, but it was up to the jury to decide the evidence in the case and make a decision.

¶ 45 The jury returned a verdict in favor of defendants. Judgment was entered on the verdict. Plaintiff filed a timely posttrial motion, seeking a judgment notwithstanding the verdict (judgment *n.o.v.*) or a new trial on the basis of the cumulative effect of error. Plaintiff asserted that defense counsel impermissibly injected new facts and theories, the trial court erred in not allowing her motion to bar Dr. Simmons, and defense counsel misstated the evidence, made unwarranted attacks on counsel and witnesses, violated the motion *in limine*, and made various other unwarranted attacks on the court and misstatements of law, the combination of which denied plaintiff a fair trial. Attached to the posttrial motion was, *inter alia*, an affidavit by Dr. Long in which he explained that he repeated the analysis of the

blood sample on Blanche and that the results of the second analysis were identical to the first analysis about which he testified during trial. He stated his laboratory did not make a decimal error or move a decimal point from .13 to 1.3 on the original analysis. There were also numerous articles concerning tort reform that were attached to the posttrial motion in an effort to show that defense counsel's references to "jackpot justice" were a direct appeal to the jury regarding the need for tort reform in Madison County.

¶ 46 Defendants filed a response to the posttrial motion arguing that plaintiff was not entitled to a judgment *n.o.v.* or a new trial because the verdict was not against the manifest weight of the evidence, the comments contained in defendants' closing argument did not deprive plaintiff a fair trial, the motions *in limine* were properly followed, and the alleged misstatements of law and evidence were proper inferences drawn from the evidence. Defendants filed a motion to strike plaintiff's exhibits in support of her posttrial motion. The trial court refused to strike the exhibits.

¶ 47 On February 26, 2009, the trial court granted plaintiff a new trial. The trial court specifically stated as follows:

"The Court finds that serious errors were made in the final arguments. Terms used by the Defense such as 'This is jackpot justice and has got to stop' and also statements that 'The Lakin Law Firm wants jackpot justice today' and that 'The Lakin Firm runs your courthouse like some of us buy lottery tickets.' "

The trial court found it should have probably barred the testimony of Dr. Simmons, but that was not a serious enough error to warrant a new trial.

¶ 48 However, relying on *Boren v. The BOC Group, Inc.*, 385 Ill. App. 3d 248, 895 N.E.2d 53 (2008), the trial court granted plaintiff a new trial. Defendants filed a petition for leave to appeal, which we initially denied; however, our supreme court directed us to vacate the order denying the petition for leave to appeal and to enter an order allowing the petition and

to consider the matter on the merits, which we now so do. *Metz v. Rosewood Care Center, Inc.*, 234 Ill. 2d 525, 917 N.E.2d 522 (2009) (supervisory order).

¶ 49

ANALYSIS

¶ 50 The first issue on appeal is whether the trial court abused its discretion in granting plaintiff a new trial. First, defendants argue the trial court abused its discretion in granting plaintiff a new trial because defense counsel's closing argument was proper and did not deprive plaintiff of a fair trial. Second, defendants argue that because plaintiff failed to object to any of defense counsel's alleged impermissibly injected facts and the alleged new defense theory of a decimal error, plaintiff waived these arguments. Third, defendants argue defense counsel did not violate the trial court's order *in limine*, and even assuming *arguendo* he did, it did not rise to the level of reversible error. Finally, defendants argue that defense counsel did not make unwarranted attacks on the trial court. Plaintiff replies that the trial court was well within its discretion in granting a new trial. Plaintiff insists she has not waived any argument and the cumulative effect of errors by defendants deprived her of a fair trial and demeaned the integrity of the judicial process. Plaintiff also asserts that defendants' injection of an entirely new and completely unsupported theory of defense during closing severely prejudiced plaintiff and warranted, if not required, a new trial. After careful consideration of the record as a whole, we agree with defendants that the trial court abused its discretion in granting plaintiff a new trial.

¶ 51 It is the province of the jury to resolve conflicts in the evidence, to decide on the credibility of the witnesses, and to decide what weight should be given to the witnesses' testimony. *Maple v. Gustafson*, 151 Ill. 2d 445, 452, 603 N.E.2d 508, 512 (1992). A trial court cannot reweigh the evidence and set aside a verdict merely because the jury could have drawn different inferences or conclusions or because it feels that other results are more reasonable. *Maple*, 151 Ill. 2d at 452, 603 N.E.2d at 512. On a motion for a new trial, the

trial court will weigh the evidence and order a new trial if the verdict is contrary to the manifest weight of the evidence. *Maple*, 151 Ill. 2d at 454, 603 N.E.2d at 512. A verdict is against the manifest weight of the evidence only where the opposite result is clearly evidenced or a jury's findings are unreasonable, arbitrary, and not based upon any of the evidence. *Maple*, 151 Ill. 2d at 454, 603 N.E.2d at 512-13. This court will not reverse a trial court's ruling on a motion for a new trial unless it is affirmatively shown that the trial court abused its discretion. *Maple*, 151 Ill. 2d at 455, 603 N.E.2d at 513. An abuse of discretion will only be found where no reasonable person would take the view adopted by the trial court. *Boren v. The BOC Group, Inc.*, 385 Ill. App. 3d 248, 254, 895 N.E.2d 53, 60 (2008). On appeal, the burden is on the appellant to show that the circuit court abused its discretion (*Boren*, 385 Ill. App. 3d at 254, 895 N.E.2d at 60), and we find defendants met this burden in the instant case.

¶ 52 The only reason the trial court gave for granting plaintiff a new trial was the error made by defense counsel during closing argument relating to his use of the phrase "jackpot justice" and disparaging remarks against plaintiff's law firm. While the trial court also said it probably should have barred the testimony of Dr. Simmons, it acknowledged that alone was not a serious error which would warrant a new trial. Relying on *Boren*, the trial court ultimately granted plaintiff a new trial. *Boren*, however, is distinguishable from the instant case.

¶ 53 In *Boren*, the plaintiff, a welder, filed a complaint against multiple defendants, alleging his Parkinson's disease was the result of exposure to welding fumes and that the defendants failed to adequately warn of the neurological risks associated with manganese in welding fumes. *Boren*, 385 Ill. App. 3d at 248-49, 895 N.E.2d at 56. The jury returned a verdict in favor of the remaining defendants. The plaintiff filed a motion for a new trial. In its order granting the plaintiff's motion for a new trial, the trial court outlined several reasons

for granting a new trial, including the highly volatile legal climate in Madison County at the time and the inference that the plaintiff's attorneys were part of a massive billboard solicitation of prospective welding fume victims in the south, which was not true, and the fact that the defendants violated the rules of discovery in failing to provide complete information to the plaintiff, especially concerning Dr. Olanow, a key witness for the defense. *Boren*, 385 Ill. App. 3d at 253, 895 N.E.2d at 59. The photograph of a billboard advertisement that was admitted was not from any of the attorneys involved in the present case and was irrelevant and immaterial and was "inaccurate and had the tendency to confuse the jury." *Boren*, 385 Ill. App. 3d at 255, 895 N.E.2d at 61. The *Boren* court specifically stated:

"We share the circuit court's concern that the use of the irrelevant billboard advertisement could have unfairly prejudiced the jury by encouraging the jury to decide the case not on the evidence, but on a general prejudice against lawyer-generated lawsuits. 'If it appears that demonstrative evidence was used for dramatic effect, or emotional appeal, rather than factual explanation useful to reasoning of the jury, such use should be regarded as reversible error.' [Citation.]" *Boren*, 385 Ill. App. 3d at 256, 895 N.E.2d at 62.

The prejudicial effect of the billboard was unintentionally compounded by the trial court when the trial court incorrectly suggested, in front of the jury, that the billboard was associated with one of the plaintiff's key expert's study and intentionally compounded by defense counsel's knowing violation of the pretrial motion *in limine* which barred defense counsel from referring to welding lawsuits like the plaintiff's as being a "cottage industry," something defense counsel did repeatedly during closing argument. *Boren*, 385 Ill. App. 3d at 257, 895 N.E.2d at 62.

¶ 54 As to the incomplete discovery disclosures, after the trial concluded, the defendants

produced in federal multidistrict litigation more than 475,000 pages of new discovery material not produced in *Boren*. Included in the newly discovered material was information revealing that the defendants failed to disclose \$600,000 worth of payments toward several studies relating to welding fumes and central nervous system injuries. These studies were used by several key defense witnesses in forming their opinions that welding was not associated with an increased frequency of Parkinson's disease. In finding such violation critical, the *Boren* court stated:

"The validity of various studies relied on by the various experts was a major issue of contention at the trial, and the undisclosed discovery information could have been used by Boren in challenging the defendants' evidence. The fact that the defendants' experts cited the funded studies as a part of the basis for their opinions makes the undisclosed information significant." *Boren*, 385 Ill. App. 3d at 258, 895 N.E.2d at 63-64.

Boren found the record supported the trial court's findings of error and the cumulative effect of such errors prejudiced the plaintiff's right to a fair trial. *Boren*, 385 Ill. App. 3d at 258, 895 N.E.2d at 64.

¶ 55 In the instant case, none of the alleged errors rise to the level of the discovery error in *Boren*, which can only be described as egregious. Moreover, the motion *in limine* in *Boren* specifically prohibited use of the term "cottage industry," but the defense repeatedly used the term. Here, the use of the term "jackpot justice" was never specifically addressed in a pretrial motion. While defense counsel made some inappropriate comments, the record here, unlike *Boren*, reflects the jury decided the case on the evidence and not prejudice towards plaintiff's attorney. Thus, we find the trial court's reliance on *Boren* misplaced.

¶ 56 We agree with defendants that plaintiff's failure to timely object waived several issues. Trial counsel's failure to object to claimed prejudicial comments during closing arguments

generally waives the issue for review. *Simmons v. University of Chicago Hospitals & Clinics*, 162 Ill. 2d 1, 12, 642 N.E.2d 107, 113 (1994). A plain-error exception to the general rule exists, but is only "applied in cases involving 'blatant mischaracterizations of fact, character assassination, or base appeals to emotion and prejudice.' [Citation.]" *Simmons*, 162 Ill. 2d at 12, 642 N.E.2d at 113.

¶ 57 In the instant case, plaintiff's counsel only objected twice during defendants' closing argument. Plaintiff's counsel never objected to use of the term "jackpot justice." Our review of the record shows that defense counsel used the term three times. Had plaintiff objected, the trial court could have instructed the jury to ignore the term or provided some other curative remedy. Furthermore, plaintiff's counsel specifically rebutted the argument of jackpot justice, stating as follows:

"[Defense counsel] talks about jackpot justice. That's pandering, folks. That's all about all this publicity that's been around. The fortunate thing is that people like you hear these cases, judge the evidence, hear the evidence that's presented by the party and make a decision, and that's what you will do today.

Well, what I find interesting is he didn't even address the numbers. He just says they're too high. I know why is because [defense counsel] knows based on the evidence that they're not. [Defense counsel] knows because he does a lot of the work that we do. Normally, he's standing in front of the jury talking about victims just like [Blanche], and the reason why he didn't take exception to those numbers is because he couldn't look you in the eye and tell you what the number would be because quite frankly he doesn't have a problem with it."

Plaintiff's counsel also addressed the issue later in his rebuttal, stating as follows:

"When you go back to the jury room anybody starts talking about those issues that [defense counsel] talked about jackpot justice, I don't suspect any of you will, remind

to read the instructions that the Judge has given you which is to follow the law. When you do, you will conclude that a verdict for the Plaintiff [is appropriate]."

Because plaintiff chose not to object, but directly addressed defense counsel's argument regarding jackpot justice, it appears his decision not to object was based upon trial strategy. Thus, we find the trial court's reliance on this issue as a reason to grant plaintiff a new trial was an abuse of discretion.

¶ 58 We are also unconvinced by plaintiff's argument that defendants' theory of a misplaced decimal point was revealed for the first time during closing argument and severely prejudiced plaintiff. The record reveals that even before the trial began, during the hearing on the motions *in limine*, defense counsel pointed out "the validity or the accuracy of the toxicology test is at issue in the case." He further stated: "I mean that's the whole case. I mean we have not—we have not readily accepted the value as they—as it is as counsel suggests." Our own painstaking review of the entire record supports defense counsel's assertion that the main issue in this case was the accuracy of the toxicology report.

¶ 59 Every witness who testified about the toxicology results agreed that the 1300 nanograms per milliliter of oxycodone found in Blanche's blood were higher than would be expected, considering that she ingested one 20-milligram tablet of OxyContin at 4 p.m. and another 20-milligram tablet of OxyContin at approximately 8:15 p.m. It is also high, considering the fact that a partially digested OxyContin pill was found in Blanche's stomach during the autopsy. The partially digested pill indicates that all of the oxycodone contained in the second pill had not yet released into Blanche's system.

¶ 60 Plaintiff's entire case hinged upon whether the second dose of 20 milligrams of OxyContin, the second lowest dosage on the market, caused Blanche's death. Clearly, the jury did not believe Dr. Long's theory that Blanche may have ingested a third pill. Our review of the record shows that theory is simply not supported by the evidence in this case

and lacked any credibility. Numerous witnesses testified about whether postmortem blood analysis was even accurate, and there was substantial evidence that it was not. Dr. Long, who had no dog in the fight here, explained that it is risky to depend on postmortem blood analysis, the type of analysis conducted in the instant case, because volume distribution of drugs is unreliable postmortem. The reason such analysis is unreliable is because when a person dies there are immediate changes to the body and all the drugs that are bound up in red blood cells are immediately released upon death, causing an artificial elevation. All experts who testified agreed that blood draw from the heart, as was done during Blanche's autopsy, has higher concentrations than blood samples taken from the groin.

¶ 61 Furthermore, the record reveals that plaintiff failed to object to defense counsel's argument during closing about a misplaced decimal point, thereby waiving such argument. As pointed out in the "FACTS" portion above, plaintiff's counsel actually addressed the issue of an improperly placed decimal point in rebuttal, incorrectly arguing that the burden somehow shifted to defendant. For plaintiff now to argue that she is entitled to a new trial on the basis of a new theory of an improperly placed decimal point interjected for the first time during closing argument is without merit.

¶ 62 It is well settled that attorneys are allowed broad latitude in closing argument. *Elam v. Lincoln Electric Co.*, 362 Ill. App. 3d 884, 900, 841 N.E.2d 1037, 1051 (2005). A judgment will only be reversed if the challenged remarks prevented a party from receiving a fair trial. *Elam*, 362 Ill. App. 3d at 900, 841 N.E.2d at 1051. While some of defense counsel's comments were inappropriate, our review shows that the comments cut both ways, with both attorneys giving as good as they received. Moreover, most of the alleged misstatements of law and evidence were actually proper inferences drawn from the evidence adduced during the eight-day trial. The record shows that none of the comments made by defense counsel rise to the level of prejudicial error necessary for plaintiff to be awarded a

new trial.

¶ 63 Overall, we believe plaintiff received a fair trial. The facts in this case are clear that Blanche was an 86-year-old medically compromised woman who suffered from, at the very least, congestive heart failure and a lumbar compression fracture. While the trial court did prohibit any reference to Blanche's prior illnesses unless a causal connection could be made between that illness and her death, we find Dr. Nanduri's testimony and Dr. Simmons' testimony provided the necessary causal connection to allow discussion of congestive heart failure. We also note that the trial court's ruling on the motion *in limine* specifically denied plaintiff's request that there be no reference to the deceased as being a very sick lady. Blanche was admitted to the hospital for congestive heart failure earlier in the summer before her death. The jury agreed with the defense theory that the toxicology report was only one piece of this case, and it looked to other evidence and Blanche's overall clinical picture. Dr. Nanduri testified that if an overdose did not cause Blanche's death, then she died of natural causes. Dr. Simmons, whose background made him the most qualified expert to render an opinion on an alleged OxyContin overdose, simply could not say whether Blanche died of an oxycodone overdose or not.

¶ 64 Plaintiff argues the trial court erred in denying her motion to bar Dr. Simmons and portions of his testimony. It is within the trial court's discretion to permit expert testimony that it believes will aid in the understanding of issues in the case. *Miller v. Rokita*, 131 Ill. App. 3d 774, 778, 476 N.E.2d 26, 28 (1985). The decision whether to admit expert testimony is left to the discretion of the trial court. *Snelson v. Kamm*, 204 Ill. 2d 1, 24, 787 N.E.2d 796, 809 (2003). Expert testimony is admissible if the proffered expert is qualified by his knowledge, skill, experience, training, or education and the testimony will assist the trier of fact in understanding the testimony. *Snelson*, 204 Ill. 2d at 24, 787 N.E.2d at 809. We see no reason why Dr. Simmons' testimony should have been excluded. Even the trial

court admitted that admission of Dr. Simmons' testimony did not warrant a new trial. While Dr. Simmons could not give an exact cause of death, he found there were other causes of death more compatible with Blanche's overall clinical picture than an oxycodone overdose. Unlike plaintiff's expert, Dr. Kruszewski, a psychiatrist who had never prescribed OxyContin, Dr. Simmons was a toxicologist and a medical doctor who prescribed the drug in question to patients and witnessed oxycodone overdoses himself.

¶ 65 Here, the burden was on plaintiff to prove that Blanche died from an overdose of OxyContin. Given the evidence, namely, Blanche's compromised health, including congestive heart failure, which was allowed to be discussed pursuant to the motion *in limine*, the low dosage of OxyContin improperly administered, Blanche's condition in the ensuing hours after its administration, and the inordinately high toxicology test results, it is clear that the jury did not believe that plaintiff met her burden. After careful consideration of the record before us, we find the verdict is not against the manifest weight of the evidence but is reasonable in light of the evidence adduced at trial, and, therefore, the trial court abused its discretion in granting plaintiff a new trial. No single error, nor even the cumulative effects of error, was such that plaintiff was unduly prejudiced. Overall, we find nothing in the record that demeaned the integrity of the judicial process.

¶ 66 Because of our determination that the trial court abused its discretion in granting plaintiff a new trial, we see no need to address the second issue raised by defendants in this appeal.

¶ 67 For the foregoing reasons, the order of the circuit court of Madison County granting plaintiff a new trial is hereby reversed.

¶ 68 Reversed.