FOURTH DIVISION
March 30, 2017

No. 1-16-1467

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ROMIL PITYOU,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 12 L 55
	)	
GERSTEIN EYE INSTITUTE, LTD., and MELVYN A. GERSTEIN, M.D.,	)	Honorable
	)	Deborah M. Dooling,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Ellis and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: We reverse the trial court's order granting defendants' motion for judgment *non obstante veredicto*, and the judgment for plaintiff is reinstated. Plaintiff made a *prima facie* case of medical malpractice; the testimony of plaintiff's expert established proximate cause of plaintiff's injury to a reasonable degree of medical certainty based on documents regularly relied upon by medical professionals. We affirm the trial court's conditional order denying defendants' motion for new trial and defendants' motion for remittitur.

¶ 2 After undergoing cataract surgery performed by other doctors, plaintiff, Romil Pityou, experienced eye pain, nausea, decrease in vision, and light sensitivity. Plaintiff sought treatment from defendant, Dr. Melvyn Gerstein who diagnosed a corneal ulcer. Plaintiff later developed endophthalmitis, a severe infection of the eye, which resulted in plaintiff permanently losing vision in one eye which shriveled up. Plaintiff filed a complaint alleging the defendants' deviation from the standard of care was a proximate cause for loss of the eye. Plaintiff's expert alleged Gerstein deviated from the standard of care in three ways: first, although Gerstein prescribed eye drops to be administered every hour, he should have ordered the drops be applied every hour around-the-clock rather than every hour during waking hours; second, Gerstein prescribed steroids at the same time he prescribed the first antibiotics, which depressed plaintiff's natural ability to fight the infection; and third, Gerstein's failure to immediately refer plaintiff to a specialist. The trial court entered a directed finding in favor of defendants on the allegation of Gerstein's failure to refer plaintiff to a specialist. Plaintiff did not appeal from that ruling, and the ruling is not at issue in this appeal.

¶ 3 Defendants' expert testified Dr. Gerstein's treatment was not a deviation from the standard of care. After considering the conflicting evidence, the jury found for plaintiff and awarded him $1.5 million in damages.

¶ 4 Defendants filed a motion for judgment *non obstante veredicto* (*n.o.v.*), which the trial court granted. The trial court found that plaintiff's expert's testimony that bacteria spread from the cornea to the inside of the eye was purely speculative. The trial court reasoned that plaintiff's expert did not examine plaintiff and relied solely on Dr. Gerstein's notes. The court noted that Gerstein stated in his notes and testimony that he did not see bacteria or a tract

showing the path bacteria took from the ulcer in the cornea to the anterior chamber of plaintiff's eye. Therefore, the court found that the plaintiff's expert testimony linking the corneal ulcer to plaintiff's endophthalmitis was purely speculative. In this appeal we must view the evidence in the light most favorable to the plaintiff to determine whether there is any evidence which supports the testimony of plaintiff's expert linking treatment by the defendant doctor to the development of plaintiff's endophthalmitis. For the following reasons, we reverse the trial court's order granting defendants' motion for judgment *n.o.v.* and reinstate the jury verdict in favor of plaintiff.

¶ 5 BACKGROUND

¶ 6 Plaintiff, Romil Pityou, went to Dr. Melvyn Gerstein (Gerstein) for treatment following two cataract surgeries performed by other doctors, who are not parties to this case. Gerstein saw plaintiff a total of eight times between August 31 and September 20, 2010. At trial, plaintiff's expert witness testified via a video recorded evidence deposition. Dr. Robert Lowenthal (Lowenthal), plaintiff's expert witness, is an ophthalmologist who specializes in retinal diseases and surgery. Lowenthal testified that he examined plaintiff's medical records (including records prior to Gerstein's treatment, Gerstein's records, and records from plaintiff's care after he left the care of defendants) and the depositions of Dr. Melvyn Gerstein, Dr. Craig Gerstein, and plaintiff Romil Pityou. Lowenthal testified that the information in the materials he reviewed is of the type reasonably relied upon by experts in his field. Lowenthal further testified the opinions he presented concerning his views that Gerstein departed from the standard of care resulting in plaintiff's endophthalmitis were all to a reasonable degree of medical certainty. The following evidence was adduced at trial.

¶ 7 Plaintiff went to Dr. Gerstein on August 31, 2010, complaining of eye pain, nausea, decrease in vision, and light sensitivity. Plaintiff had gone from having 20/40 vision, which would permit someone to legally drive in Illinois without corrective lenses, to hand motion vision. Hand motion vision is when someone cannot see how many fingers are being held up in front of them, only that a hand is being waved. Following a screening for visual acuity performed by one of Gerstein's technicians, Gerstein examined plaintiff and diagnosed a corneal ulcer, an inflammation in the eye's cornea. Gerstein examined plaintiff's eye using a slit lamp, a type of microscope used to see different layers of the eye at up to 25 times magnification. Gerstein observed white blood cells in the anterior chamber of plaintiff's eye – white blood cells are the cells of our immune system that fight off foreign invaders and infectious diseases. He testified the cells can appear in the anterior chamber of the eye for a variety of reasons: an infection, an inflammation of the iris, a corneal abrasion, or even a virus. Serious infections can cause an acute response called a hypopyon, which happens when a number of white blood cells in the anterior chamber pile up on each other and form a layer. Gerstein testified that he searched for, but did not observe a hypopyon in plaintiff's eye. Gerstein prescribed steroids to treat the inflammation and antibiotics to treat the infection. Lowenthal's opinion was that Gerstein's record of plaintiff's condition demonstrated a serious condition because Gerstein's notes and testimony indicated the corneal ulcer reached the stroma layer of the cornea: "there was a stromal infiltration, that means that the infection was not just on the surface but it was already eroding into the middle of the cornea." Lowenthal explained that the condition was "more serious than a superficial infiltrate where maybe it's just isolated to the superficial epithelial layer. When [Gerstein] says it's in the stroma, he means that this is something that's

serious." The cornea has five layers, and the stroma is the middle layer of the cornea. The Descemet's membrane and corneal endothelium are the last two layers of the cornea between the eye's anterior chamber.

¶ 8 Another reason Lowenthal believed plaintiff's condition was more serious than Gerstein noted was because of the recorded presence of white blood cells in the anterior chamber of plaintiff's eye:

> "White blood cells are the body's way, the eye's way of mounting a response to infection.
>
> And that's highly suggestive that this is a very serious infection where the bacteria have penetrated deeply enough into the cornea that there – there's great potential that they could enter the eye and cause endophthalmitis if they're not treated quickly and appropriately."

In Lowenthal's opinion, Gerstein's treatment departed from the standard of care beginning with plaintiff's first visit on August 31. Lowenthal felt Gerstein departed from the standard of care by prescribing antibiotics and steroids at the same time, and also by not instructing plaintiff to apply the antibiotic eye drops every hour around-the-clock and not simply during waking hours. It was Lowenthal's opinion that Gerstein should have waited for a favorable response from the antibiotics before prescribing steroids because steroids counteract the effects of the antibiotics by suppressing the body's ability to fight infection. Lowenthal testified that "if the antibiotic we have chosen is appropriate, these organisms are going to respond pretty quickly. Usually within 24 hours. *** But after 48 hours if we're not getting a favorable response *** what we are treating is not responding to our treatment." He then explained that a patient would show

favorable response to treatment if the corneal ulcer got "smaller. The amount of white blood cells or infiltrate around the ulcer would start to – to lessen, *** the vision would start to improve as well." Lowenthal noted how it was a good sign that plaintiff's ulcer was in the periphery of the eye because such ulcers may be treated without causing loss in vision: "if it's treated appropriately, then any scarring that might be left would be in the peripheral part of the cornea which would not affect the vision." Though Lowenthal felt the ulcer could have been treated effectively, he also felt that Gerstein's record indicated a more significant infection on August 31 than Gerstein's notes and testimony indicated.

¶ 9 There was no noted improvement on plaintiff's next visit to Gerstein on September 2. Gerstein removed sutures from plaintiff's eye, noted "infected sutures" in his diagnosis, and prescribed a different antibiotic eye drop (Vancomycin, one of the strongest antibiotics ophthalmologists have access to) to be administered every hour rather than every two hours. Gerstein testified that there was slight improvement from plaintiff's previous visit because there were no cells present in the anterior chamber. However, Lowenthal testified that Gerstein's record showed no change in plaintiff's condition. Plaintiff's vision failed to improve over those 48 hours, and Lowenthal noted how sutures could have been a source of infection and Gerstein removed them on September 2.

¶ 10 On September 3, plaintiff again saw Gerstein, who found no cells in the anterior chamber. Plaintiff noted an improvement to pain and light sensitivity. Gerstein testified that although the decrease in presence of cells in the anterior chamber can be a sign of improvement, it depends on whether there is "a significant change in the appearance of the cells." Gerstein further testified that he saw no significant change in the appearance of the cells in the anterior

chamber of plaintiff's eye at any point during the course of treatment. Lowenthal noted:

> "The level of improvement would be based on what the initial vision was. If in his case it was hand motion, you know, I would expect that day by day we would see progressive improvement going from hand motion to being -- meaning all he could see is a hand moving in front of him but he can't see individual fingers -- and I would be expectant that by the next day he would be able to count fingers.
>
> And then we would expect maybe by the second or third day that he would start to be able to see some letters on the chart."

Lowenthal found it problematic that plaintiff's vision had not improved and was still at hand motion; he felt that plaintiff's vision should have improved by this point if the treatment had been effective.

¶ 11 Gerstein next saw plaintiff on September 5. Gerstein testified that plaintiff's condition improved because the ulcer was smaller and plaintiff was experiencing less pain. However, Gerstein's examination again revealed cells in the anterior chamber. Gerstein recorded "no hypopyon" in his medical notes.

¶ 12 Lowenthal felt Gerstein's record of the September 5 examination showed that plaintiff's condition worsened, even though plaintiff reported less pain and light sensitivity, because while plaintiff reported better subjective feeling, the objective findings demonstrated lack of response to treatment: the eye was "still very red and now the cells are back in the anterior chamber which suggested it got worse from two days before," and "there's more inflammation inside the eye." Because of this, Lowenthal testified that Gerstein's record indicated plaintiff was "not responding to treatment."

¶ 13 On plaintiff's next visit, September 7, plaintiff reported to Gerstein that he was feeling better and was finally able to sleep. Gerstein noted how plaintiff's ulcer was smaller and vision had improved (plaintiff went from only being able to see hand movements to being able to count fingers). However, at another point during plaintiff's counsel's cross-examination of Gerstein, Gerstein testified that his drawings of the ulcer, and therefore determination of improvement, were unreliable:

> "Q. Dr. Gerstein, *** we were talking about one of your ways of monitoring improvement with a corneal ulcer is that the size of the ulcers improves, true?
>
> A. True
>
> Q. And in this case we don't have it in your records that it did improve or not because you didn't measure it and you can't rely on your drawings, true?
>
> A. True."

Gerstein decreased plaintiff's application of antibiotics to once every four hours. Lowenthal agreed that the medical record indicated signs of improvement and that Gerstein had ordered a decrease in antibiotic dose.

¶ 14 Plaintiff next went to defendants on September 11, and Gerstein's son, Dr. Craig Gerstein, examined plaintiff. Plaintiff complained of worsening symptoms. Lowenthal found the medical record indicated plaintiff experienced "a total reversal of" condition from the previous appointment because plaintiff was again experiencing "headache, nausea, pain, tearing, trouble sleeping because of pain for the past two days and trouble opening his eye."

¶ 15 On September 13, plaintiff saw Gerstein next and reported feeling better – Gerstein noted

plaintiff's eye was less red and a slight improvement in vision (though plaintiff's vision was still limited to only counting fingers). However, Lowenthal found that this visit did not demonstrate actual improvement because while some subjective factors had improved, plaintiff's vision had not: "He's still only able to see fingers, to count fingers on both of those days so there's no objective improvement in his vision. *** He should definitely have been beyond counting fingers by that point."

¶ 16 At plaintiff's next visit on September 16, Gerstein found that plaintiff's symptoms had worsened. Plaintiff's vision deteriorated to the point that he could only make out hand motion. Gerstein increased the frequency of plaintiff's application of antibiotic eye drops to once every two hours. In Lowenthal's opinion, plaintiff had "gotten much worse to the point where Dr. Gerstein has doubled the frequency of the two antibiotic eyedrops." Lowenthal felt that the medical record showed no sign of plaintiff improving between September 13 and 16, nor was there improvement following. "People's impressions of how they're feeling, how they're doing, that's subjective. They change. But what I'm basing my opinion on is this man's vision which is not improving." Lowenthal reasoned that plaintiff's condition had not improved at all over the course of treatment not only because plaintiff's vision failed to improve over the course of treatment, but also because at the end of Gerstein's treatment plaintiff "still has three plus injection of the conjunctival blood vessels. He still has a corneal stromal ulcer and there are still cells in the anterior chamber." Plaintiff's condition had not improved from September 16. Plaintiff had his last appointment with Gerstein on September 20. Plaintiff was scheduled to see Gerstein again on September 23.

¶ 17 Following plaintiff's September 20 appointment with Gerstein, plaintiff went to the

emergency room on September 22 because he had become increasingly sensitive to light and was experiencing severe pain in his eye. He was referred to a retina specialist, who diagnosed him with endophthalmitis. Doctors performed surgery in an attempt to save plaintiff's eye, but were unsuccessful. Plaintiff's medical records indicate endophthalmitis caused plaintiff's eye to shrivel up and resulted in permanent loss of vision in that eye. Plaintiff sued defendants alleging Gerstein's deviations from the standard of care resulted in plaintiff's endophthalmitis causing permanent loss of vision in one eye.

¶ 18 Lowenthal testified that Gerstein's departure from the standard of care was the proximate cause of plaintiff developing endophthalmitis. Lowenthal's testimony included how Gerstein deviated from the standard of care in two ways: first, by prescribing antibiotics and steroids at the same time, and second by instructing plaintiff to apply antibiotic eye drops every hour but failing to instruct plaintiff to continue the regimen 24 hours a day and not simply during waking hours. In Lowenthal's opinion, prescribing a steroid decreased plaintiff's natural ability to fight the infection and allowed some bacteria to stay alive despite the antibiotic treatment. He testified that the irregular antibiotic regimen was problematic because the bacteria were exposed to the antibiotic, but not for a long enough period of time to kill all of them, so the surviving bacteria developed resistance to the antibiotic and made the infection significantly harder to treat. Lowenthal's expert opinion was "that this corneal ulcer that was not being appropriately treated allowed for bacteria to break through the cornea, to eat their way through all layers of the cornea *** once bacteria get into the anterior chamber *** bacteria can spread over hours inside the eye, infect the retina." Lowenthal's expert opinion was that Gerstein's record of treating plaintiff demonstrated the development of endophthalmitis.

¶ 19 Defendants' expert, Dr. David Springer (Springer), testified that plaintiff's condition throughout Gerstein's treatment was not indicative of endophthalmitis, and that it was inconclusive as to how plaintiff developed endophthalmitis. Springer testified that it was not a departure from the standard of care to prescribe an antibiotic and a steroid at the same time. Springer explained that the corneal ulcer was causing inflammation that had to be treated, and that the steroid was necessary to treat the inflammation. Springer also testified that it was not a departure from the standard of care to not instruct plaintiff to continue application of the antibiotic eye drops during nighttime because the particular antibiotics prescribed are extremely potent and have a sufficiently long half-life to maintain a therapeutic level while plaintiff was asleep. Springer maintained that the antibiotics did not lose their potency while plaintiff was asleep, and that the period without antibiotic application could not have allowed bacteria to survive and become resistant. Springer's opinion was that although there was a temporal connection between the ulcer plaintiff sought treatment for and the endophthalmitis, he saw no evidence of a causal connection. Gerstein testified that endophthalmitis can develop as long as six months to a year following cataract surgery. Bacteria can become sequestered in a part of the eye and, when the bacteria later become active, can cause endophthalmitis.

¶ 20 On October 27, 2015, the jury returned a verdict in plaintiff's favor, awarding him $1.5 million. Defendants filed a post-trial motion for judgment *n.o.v.* on January 28, 2016. On April 29, 2016, the trial court granted defendants' motion for judgment *n.o.v.* and reversed the jury award. The trial court found that although defendants failed to lodge objection to admission of plaintiff's expert testimony, plaintiff failed to make a *prima facie* case of medical malpractice. The court ruled that Lowenthal was merely speculating as to the cause of the endophthalmitis

because Lowenthal had no evidence of bacteria in the anterior chamber of plaintiff's eye. Because the court found Lowenthal's proximate cause testimony speculative, it found that plaintiff did not have expert testimony to a reasonable degree of medical certainty that defendants' negligence caused plaintiff's endophthalmitis. This appeal followed.

¶ 21 ANALYSIS

¶ 22 Plaintiff appeals from the trial court's grant of defendant's motion for judgment *n.o.v.* Plaintiff maintains that he made a *prima facie* case of medical malpractice because his expert witness testified as to the required standard of care, how Gerstein deviated from that standard of care, and how that deviation resulted in plaintiff developing endophthalmitis. An appeal of a trial court's granting of a motion for judgment *n.o.v.* confronts this court with a question of law (*Keen v. Davis*, 108 Ill. App. 2d 55, 62 (1969)), which we review *de novo*. *Townsend v. University of Chicago Hospitals*, 318 Ill. App. 3d 406, 409 (2000). Our review of a judgment *n.o.v.* uses the same standard as applied at the trial level. *Johnson v. National Super Markets, Inc.*, 257 Ill. App. 3d 1011, 1015 (1994).

¶ 23 Judgment *Non Obstante Veredicto*

¶ 24 Our supreme court explained the standard courts should use for judgments *n.o.v.*:

"verdicts ought to be directed and judgments *n.o.v.* entered only in those cases in which 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." *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967). A court ruling on a motion for judgment *n.o.v.*

> "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).

A new trial may be ordered when the jury's verdict is against the manifest weight of the evidence, but judgment *n.o.v.* produces a radically different result, justifying why "a more nearly conclusive evidentiary situation ought to be required before a verdict is directed than is necessary to justify a new trial." *Id*. at 509–10. A court cannot "enter a judgment *n.o.v.* if there is any evidence, together with reasonable inferences to be drawn therefrom, demonstrating a substantial factual dispute, or where the assessment of credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome." *Maple*, 151 Ill. 2d at 454. While we do not weigh the evidence or assess the credibility of witnesses, there must be a factual dispute present for us to deny the motion for judgment *n.o.v.* A court should direct verdict in favor of the defense "only where the plaintiff has failed to establish a *prima facie* case. [Citation.]" *Hemminger v. LeMay*, 2014 IL App (3d) 120392, ¶ 17.

¶ 25 "A *prima facie* case is established by presenting some evidence on every essential element of the cause of action. [Citation.]" *Perkey v. Portes-Jarol*, 2013 IL App (2d) 120470, ¶ 63. In a medical malpractice action, to have a *prima facie* case the plaintiff must first provide expert testimony proving what standard of care was due, and then show how the doctor departed from that standard of care and how that departure from the standard of care caused plaintiff's injury. *Borowski v. Von Solbrig*, 60 Ill. 2d 418, 423 (1975). A *prima facie* case cannot be based on an expert's speculations or conjectures; plaintiff has the burden "to produce evidence, either

direct or circumstantial [citation], to show not only that injuries exist but also that they were the result of the occurrence at issue [citation.]" *Mesick v. Johnson*, 141 Ill. App. 3d 195, 204 (1986). For a plaintiff's expert medical testimony establishing a *prima facie* case, the "physician must testify either that his opinions are within a reasonable degree of medical certainty or that his opinions are based upon specialized knowledge and experience and grounded in recognized medical thought." *Soto v. Gaytan*, 313 Ill. App. 3d 137, 147 (2000). "An expert's opinion is only as valid as the bases and reasons for the opinion. When there is no factual support for an expert's conclusions, his conclusions alone do not create a question of fact." *Gyllin v. College Craft Enterprises, Ltd.*, 260 Ill. App. 3d 707, 715 (1994).

¶ 26 Though the physician's testimony need not be definitive, it has no factual basis if the opinion is simply conjecture or speculation:

> "while it is true that an expert witness may not base his opinion on conjecture or speculation [citation], it is also well-settled that a physician may testify to what might or could have caused an injury despite any objection that the testimony is inconclusive. 'Such testimony is but the opinion of the witness given on facts assumed to be true.' [Citation.] It remains for the trier of fact to determine the facts and the inferences to be drawn therefrom. [Citations.]" *Mesick*, 141 Ill. App. 3d at 205–06.

The standard from *Mesick* concerning a physician's testimony is clear: a *prima facie* case still exists if the physician testified as to what "might or could have caused an injury," but the physician may not simply speculate. *Id.* A doctor's "opinion, based on a reasonable degree of medical certainty, *** meets the 'might or could' standard set forth in *Mesick* ***." *Geers v.*

Brichta, 248 Ill. App. 3d 398, 408 (1993). "Because a trial court cannot weigh or judge the credibility of witnesses in deciding a motion for a directed verdict, the reviewing court need not give substantial deference to the trial court's ruling. [Citation.]" *Hemminger*, 2014 IL App (3d) 120392, ¶ 18. Accordingly, we review the motion for judgment *n.o.v.* anew, but do not weigh any of the testimony or assess the credibility of the witnesses. Instead, our examination concerns whether Lowenthal had any evidence to show that Gerstein's treatment could have caused plaintiff's endophthalmitis.

¶ 27 Plaintiff's Expert had a Factual Basis to Support a *Prima Facie* Case Against Defendants

¶ 28 Defendants argue plaintiff failed to make a *prima facie* case supporting a claim of medical malpractice. We initially note that defendants failed to object to admission of Lowenthal's testimony. They therefore forfeit any issue as to its admissibility. *Bachman v. General Motors Corp.*, 332 Ill. App. 3d 760, 782 (2002). Defendants maintain that they have no objection to the admissibility of the evidence, but rather question the sufficiency of the evidence. Defendants argue that their failure to lodge an objection does not absolve plaintiff of the requirement that his expert have a factual basis for the testimony establishing a *prima facie* case. We must still evaluate on motion for judgment *n.o.v.* whether plaintiff established a *prima facie* case. Our examination therefore turns on whether, when construing the entire record and drawing all reasonable inferences therefrom in favor of the plaintiff, the evidence so favored the defendant that no contrary verdict based on the evidence could ever stand. *Pedrick*, 37 Ill. 2d at 510.

¶ 29 Defendants claim plaintiff failed to make a *prima facie* case because his expert witness lacked a factual basis for his causation testimony. Defendants argue Lowenthal's theory of

causation was speculative because he did not physically observe plaintiff, and because Gerstein did not visually observe bacteria or any tracts showing the path bacteria took to enter the anterior chamber of plaintiff's eye.

¶ 30 However, Lowenthal testified that a tract showing the bacteria's passage to the anterior chamber would be too microscopic for observation under a slit lamp. Lowenthal explained with such a tract, "you wouldn't be able to see it unless you cut out the cornea and looked at it histopathologically under a microscope which we're not going to do." There was no search performed by Gerstein with a microscope of sufficient magnification to see such a tract. Therefore, Gerstein would have been unable to see a tract. However, Lowenthal reasoned bacteria were present in the anterior chamber of plaintiff's eye based on plaintiff's medical records showing the presence of white blood cells. Gerstein's examination revealed the presence of white blood cells in the anterior chamber of plaintiff's eye. Gerstein testified that white blood cells "appear in the anterior chamber for a variety of reasons. The patient can have a virus. The patient can have *** an inflammation of the iris. Patient can have a corneal abrasion. The patient can have an infection." Defendants' position is that because no one identified a tract bacteria followed, we should disregard other evidence of bacteria in the anterior chamber of plaintiff's eye. Lowenthal, as an expert witness, was able to evaluate all of the medical records and evidence to draw reasonable inferences concerning his expert medical opinion; he was free to provide his medical opinion on what the recorded presence of white blood cells in the anterior chamber meant based on all of the evidence. See *Mesick*, 141 Ill. App. 3d at 205–06; *Geers*, 248 Ill. App. 3d at 408. Lowenthal came to the conclusion that the white blood cells were an indicator of a bacterial infection. Lowenthal further testified as to how plaintiff's symptoms

demonstrated an infection (namely that plaintiff's vision and inflammation failed to improve over the course of treatment). Hence, it was not mere speculation that bacteria were able to eat through the remaining two layers of the cornea, enter the anterior chamber, and from there infect the retina.

¶ 31 We are not persuaded by defendants' argument that Gerstein never visually observed bacteria in plaintiff's eye. Gerstein performed his examinations of plaintiff's eye using a slit lamp device which had a 25 times magnification. Lowenthal explained how a specific procedure is used to identify bacteria; a doctor must stick a

> "very small needle into the eye to basically withdraw some fluid, take a biopsy, take a culture to try to find out what organism is causing the infection, to culture that -- we do a gram stain and culture to try to identify the organism and find out what antibiotics it's sensitive to help guide our treatment."

Doctors performed this "tap and inject procedure" on Sept 22, when they took a biopsy of plaintiff's eye and then injected it with antibiotics. It was then that doctors confirmed a diagnosis of endophthalmitis. There is nothing in the record to show Gerstein performed such a test. Though Gerstein made no visual observation of bacteria inside the anterior chamber, when we view the evidence in the light most favorable to the plaintiff, as we are required to do in this case, the medical record contained sufficient circumstantial evidence for an expert to opine that bacteria were present. The circumstantial evidence consisted of: 1) Gerstein's notes that the sutures were infected; 2) Gerstein's notes showing the presence of white blood cells; 3) the symptoms plaintiff presented, namely how plaintiff's vision never improved and that with effective treatment the vision should have improved; and, 4) on September 2 Gerstein prescribed

Vancomycin to plaintiff, one of the strongest antibiotics ophthalmologists have access to, in order to treat a serious infection (although there was evidence Gerstein failed to instruct plaintiff to apply an adequate dosage). We find there was sufficient circumstantial evidence for an expert to conclude with a reasonable degree of medical certainty that bacteria were in the anterior chamber. Of course, medical experts can disagree over a diagnosis, as they did in this case. The jury was presented with differing expert opinions, was left to weigh the evidence, and came to a conclusion as to which testimony they found most credible. We are not in the province of weighing anew factual issues decided by a jury. *Maple*, 151 Ill. 2d at 454. The medical record contained evidence that would allow a medical expert to opine with a reasonable degree of medical certainty that bacteria were present in the anterior chamber of plaintiff's eye. *Geers*, 248 Ill. App. 3d at 408.

¶ 32 Defendants allege Lowenthal did not base his testimony on the medical record because he criticized the records – specifically how Lowenthal believed the ulcer and inflammation were worse than what Gerstein reported even though Lowenthal was not present for the examination. We note that Lowenthal was asked whether there were any findings he believed Gerstein missed and Lowenthal replied:

> "More likely than not the corneal ulcer was larger than [Gerstein] drew. It involved a greater amount of the cornea and with cells in the anterior chamber it is likely, more likely than not that there was a lot more inflammation in the eye than what he had drawn. Meaning this was a lot more serious condition."

However, Gerstein himself admitted that his drawings of the ulcer were unreliable:

> "Q. Dr. Gerstein, *** we were talking about one of your ways of

monitoring improvement with a corneal ulcer is that the size of the ulcers improves, true?

A. True

Q. And in this case we don't have it in your records that it did improve or not because you didn't measure it and you can't rely on your drawings, true?

A. True."

Because Gerstein himself admitted his drawings were not accurate, we do not find Lowenthal's testimony stating the same fact to be speculative. When reviewing the record and drawing all reasonable inferences in favor of the plaintiff, we find that Lowenthal's expert opinion that Gerstein's treatment negligently caused plaintiff's endophthalmitis was not mere speculation or conjecture and was based on facts in the record.

¶ 33 Defendants contend that Lowenthal's testimony was pure speculation, relying on our decision in *Modelski v. Navistar International Transportation Corp*, 302 Ill. App. 3d 879 (2015). However, we find the facts of *Modelski* are inconsistent with the present case. *Modelski* concerned a wrongful death suit where the decedent was using a tractor to mow his field and died of injuries from the rotary mower attached to the rear of the tractor. *Id*. at 881. An expert witness on defendant's behalf testified that he believed the tractor stalled, that decedent got out to examine the problem but failed to take the tractor out of gear or disengage the mower, and that decedent probably removed some bolts while investigating the problem. The expert's opinion was that decedent died because he attempted to restart the tractor while standing on the ground, whereupon the tractor moved forward, knocked decedent to the ground, and then caused the mower to be drawn over him. *Id*. at 884-85. However, the expert testified under cross-

examination that there was no physical evidence to support his theory; there was no evidence the tractor had stalled at all or that decedent ever dismounted the tractor. *Id*. at 885. On appeal, we determined that the expert's opinion was pure speculation consisting of "fictional musings" because the expert had no factual basis to support that the tractor stalled or that decedent got off the tractor. *Id*. at 886.

¶ 34 *Modelski* is distinguishable from the present case. Lowenthal's testimony was based on the medical record. There was physical evidence indicating the presence of bacteria in the anterior chamber of plaintiff's eye, which was the presence of white blood cells. In our view, Lowenthal was not musing when he opined that the white blood cells indicated bacterial presence in the anterior chamber. Moreover, unlike the expert in *Modelski* who had no evidence to support his theory and no witnesses to the accident, here we have medical records detailing plaintiff's condition over the course of treatment. Lowenthal explained how plaintiff's vision did not improve and that plaintiff's symptoms demonstrated an ongoing infection that was not being properly treated. Experts are free to disagree and interpret medical records differently. However, *Modelski* cannot support excluding Lowenthal's testimony because in *Modelski* the expert had no evidence to support his theory while Lowenthal based his theory on plaintiff's recorded symptoms.

¶ 35 Lowenthal based his opinion that Gerstein's treatment allowed bacteria to enter plaintiff's anterior chamber and cause endophthalmitis from plaintiff's medical records before, during, and after his treatment with Gerstein. Lowenthal testified that based on the initial symptoms Gerstein recorded, Gerstein's treatment deviated from the standard of care. Lowenthal's opinion was that plaintiff had a serious infection that could be treated without plaintiff losing vision.

Lowenthal felt that the correct course of treatment was to prescribe antibiotics without steroids and wait for a favorable response. Lowenthal formed his opinion that the antibiotic regimen combined with the steroids failed to treat the infection because plaintiff's vision should have improved over the course of treatment, but it only improved to being able to count fingers and then quickly deteriorated again to hand motion. Lowenthal's opinion was that this indicated how the treatment was ineffective. He testified that prescribing steroids and antibiotics together left plaintiff less able to naturally fight the infection, and the irregular application of the antibiotics allowed bacteria to remain in the eye and develop resistance. Lowenthal pointed to plaintiff's medical record where Gerstein's notations indicated plaintiff failed to show response to treatment within the first 48 hours. In Lowenthal's opinion, plaintiff's vision not improving indicated the continued presence of infection. He noted how the other symptoms indicating possible effectiveness of treatment were less objective measurements because they were based on plaintiff's subjective feelings, and the objective symptoms demonstrated development of endophthalmitis. The white blood cells in the anterior chamber provide evidence that bacteria were able to eat through the cornea and enter the anterior chamber. Gerstein himself testified that cells in the anterior chamber can be an indicator of an infection. Moreover, Gerstein prescribed one of the strongest antibiotics available to be prescribed by ophthalmologists in order to treat plaintiff. Lowenthal testified that Gersein failed to properly instruct plaintiff as to the proper application of antibiotics. It was Lowenthal's opinion that the initial round of antibiotics proved ineffective, as shown by how plaintiff failed to show signs of improvement after 48 hours, because of Gerstein's failure to properly instruct plaintiff and because Gerstein prescribed steroids alongside the antibiotics. Lowenthal was not merely speculating that Gerstein deviated

from the standard of care and that the deviation caused plaintiff's endophthalmitis: he offered his expert opinion based on the medical record.

¶ 36 We find our ruling in *Walton v. Dirkes* applicable to the present case. *Walton v. Dirkes*, 388 Ill. App. 3d 58 (2009). In *Walton*, the judge granted judgment *n.o.v.* on the basis that the plaintiff's expert medical testimony concerning the causal connection between Trevor Walton's death and the doctor's departure from the standard of care was too speculative. *Id*. at 58. Walton went to his primary care physician for what appeared to be an allergy or infection, but one month later was diagnosed with acute lymphoblastic leukemia before he died of a heart attack due to the leukemia the following day. *Id*. at 58-59. The plaintiff's estate sued the defendant doctor for medical malpractice, arguing the doctor's failure to order a complete blood count delayed diagnosis of the leukemia and caused Walton's death. *Id*. at 59. A jury found for the plaintiff, but the trial judge found that the plaintiff's expert medical testimony failed to prove a causal connection between the failure to order a complete blood count and the injury. *Id*. The plaintiff's expert testified that Walton would have had an abnormal blood count for several months prior to his death, and that it was more likely than not that a diagnosis of leukemia would have been made earlier had a complete blood count been ordered. *Id*. at 68. We reversed the trial judge, finding that the plaintiff offered "evidence to a reasonable degree of medical certainty that defendant's negligent failure to order a [complete blood count] *** delayed diagnosis of [leukemia] and lessened the effectiveness of Walton's medical treatment." *Id*. at 67. Similarly, Lowenthal's opinion that Gerstein's negligence caused plaintiff's injury was based on information regularly relied upon by medical professionals, and he testified that it was offered to a reasonable degree of medical certainty. Lowenthal did not blindly come up with the opinion

that bacteria ate their way through plaintiff's eye and infected the retina. He based that opinion on the medical record – he pointed to specific symptoms and results of Gerstein's examinations that revealed an infection which affected the middle layer of the cornea, called the stroma, to explain the progression of plaintiff's endophthalmitis. We found a sufficient factual basis in *Walton* because doctors testified they would have performed necessary procedures had they been given the complete blood count, and the plaintiff's medical expert testified that Walton must have had the leukemia earlier and that a complete blood count would have revealed the leukemia based on Walton's condition in the medical records. *Id*. at 69. Here, Lowenthal can offer his opinion as to what plaintiff's symptoms meant – that they demonstrated the development of endophthalmitis.

¶ 37 Defendants argue that Lowenthal's testimony cannot be based upon a reasonable degree of medical certainty because of our ruling in *Wiedenbeck v. Searle*, 385 Ill. App. 3d 289 (2008). We disagree. In *Wiedenbeck*, Cheryl Anderson–Wiedenbeck went to Dr. Searle complaining of the most intense headache of her life lasting for two days and Searle prescribed her antibiotics. *Id*. at 290. The next night, Wiedenbeck went to the emergency room and had a CT scan done. In the early hours of the following morning, Wiedenbeck suffered irreparable brain damage before surgery could be performed. *Id*. at 291. Her estate sued a number of parties involved, and this action concerned a claim specifically against Searle for failing to order a CT scan when Wiedenbeck came to him complaining of a headache lasting two days. The plaintiff presented expert testimony concerning proximate cause. *Id*. at 295. However, on cross-examination that expert explicitly stated his opinion that Wiedenbeck would have received effective treatment earlier had the CT scan been performed was "pure speculation." *Id*. at 296. Plaintiff's neurology

expert also testified under cross-examination that it was purely speculative as to whether a CT scan would have shown the necessity of earlier intervention. *Id*. at 298. We found that while plaintiff's experts agreed that Searle departed from the standard of care, there was only a mere possibility of a causal connection to plaintiff's injury because the experts both stated they were speculating as to whether plaintiff could have been treated: "no expert evidence was offered to a reasonable degree of medical certainty that Dr. Searle's alleged deviation caused Wiedenbeck's injuries or lessened the effectiveness of her medical treatment." *Id*. at 299. *Wiedenbeck* is clearly distinguishable from the present case because Lowenthal never stated he was speculating as to how the endophthalmitis occurred. He explained the specific symptoms plaintiff experienced and how the medical record reflected the development of endophthalmitis. Lowenthal testified to a reasonable degree of medical certainty that Gerstein's treatment allowed the endophthalmitis to develop and caused plaintiff to permanently lose vision in one eye.

¶ 38 Defendants must demonstrate that the jury not only went against the manifest weight of the evidence, but that the evidence could not possibly support a contrary verdict. *Pedrick*, 37 Ill. 2d at 510. They failed to do so. Because we may only grant a motion for judgment *n.o.v.* when the evidence overwhelmingly favors the movant (*id*.), and the evidence does not overwhelmingly favor defendants, we cannot grant defendants' motion for judgment *n.o.v.*

¶ 39 Neither New Trial nor Remittitur Warranted

¶ 40 Defendants argued, in the alternative, in their motion for judgment *n.o.v.* that they were entitled to a new trial or that remittitur was warranted. The trial court entered a conditional ruling under 735 ILCS 5/2-1202(f) (West 2016) denying both motions. We review a trial court's ruling on a motion for a new trial for abuse of discretion. *Maple*, 151 Ill. 2d at 455. "A ruling on

a motion for a remittitur is reviewed for an abuse of discretion." *Diaz v. Legat Architects, Inc.*, 397 Ill. App. 3d 13, 45 (2009). We affirm the court's order denying a new trial and remittitur, finding the court did not abuse its discretion. On appeal, defendants argue in the alternative that if we should find judgment *n.o.v.* inappropriate, we should still remand the cause for a new trial because the jury finding was against the manifest weight of the evidence. A jury's finding is against the manifest weight of the evidence when it is unreasonable, arbitrary, and not based upon any of the evidence. *Snelson v. Kamm*, 204 Ill. 2d 1, 35 (2003).

¶ 41 We note that defendants' posttrial motion for judgment *n.o.v.* or new trial claimed the jury was prejudiced by Lowenthal repeating throughout his testimony that Gerstein should have referred plaintiff to a cornea specialist; and, defendants claimed the jury award was excessive. The trial court entered judgment denying both requests. The trial court found that a new trial should not be granted because the jury received an instruction to disregard Lowenthal's statements that Gerstein should have referred plaintiff to a specialist, and a jury is presumed to follow the court's instructions. *Davis v. City of Chicago*, 2014 IL App (1st) 122427, ¶ 90. We agree.

¶ 42 Defendants themselves admit that Lowenthal testified that plaintiff's symptoms throughout Gerstein's treatment indicated endophthalmitis. Defendants complain that plaintiff did not rebut how Gerstein testified that those same symptoms are consistent with corneal ulcers rather than the development of endophthalmitis. The jury heard conflicting expert testimony on whether Gerstein deviated from the standard of care and whether Gerstein's treatment caused plaintiff's injury; the jury was free to evaluate the testimonies and credibility of the witnesses. They came to the conclusion that Gerstein deviated from the standard of care and that this

deviation caused plaintiff's endophthalmitis. We cannot say that the jury's verdict was arbitrary or unreasonable. Because we find that the jury's verdict was not against the manifest weight of the evidence, we do not grant defendants a new trial. *Pedrick*, 37 Ill. 2d at 509.

¶ 43 Finally the trial court found that the jury award was not excessive, was based on the evidence presented at trial, did not shock the judicial conscience, was not the result of sympathy, and fell within the flexible range of reasonable compensation. Determination of whether a jury verdict is excessive turns on whether the verdict falls within the flexible limits of fair and reasonable compensation. *Kopczick v. Hobart Corp*., 308 Ill. App. 3d 967, 979 (1999). "If the jury's award falls within the flexible range of conclusions reasonably supported by the evidence, it must stand." *Jones v. Chicago Osteopathic Hospital*, 316 Ill. App. 3d 1121, 1138 (2000). We find that the trial court did not abuse its discretion when it denied defendants' request for remittitur. Based on our review of the record, we see no reason to disturb the trial judge's judgment finding the jury award was not excessive and denying defendants' request for remittitur.

¶ 44 CONCLUSION

¶ 45 For the foregoing reasons, we reverse the order of the circuit court of Cook County granting defendants' motion for judgment *n.o.v.*, affirm the court's denial of new trial and remittitur, and we reinstate the jury verdict in favor of plaintiff.

¶ 46 Affirmed in part; reversed in part; remanded with instructions.