FIRST DIVISION
May 6, 2013

No. 1-11-3190

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LISA TAYLOR CUEVAS and LUIS CUEVAS,	)	Appeal from the Circuit Court
	)	of Cook County
Plaintiffs-Appellants,	)	
	)	
v.	)	No. 06 L 9670
	)	
JAY M. PENSLER, and JAY M. PENSLER, M.D.S.C.,	)	
an Illinois Corporation,	)	Honorable
	)	Susan Zwick,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 ***Held:*** In this case involving various claims resulting from a cosmetic surgery, the losing plaintiffs are not entitled to a new trial where introduction of evidence in violation of a prior ruling on a motion *in limine,* defendant's review of deposition during cross-examination, and providing defendants' expert with plaintiffs' expert's evidence deposition did not prejudice their case. The trial court did not err in refusing to admit a photograph or denying plaintiffs' motion for a mistrial. Because of the parties' stipulation, the trial court also did not err in accepting a less-than-unanimous jury verdict. We affirm the judgment of the trial court in favor of the medical providers.

¶ 2 Plaintiffs, Lisa Taylor Cuevas (Lisa, Cuevas, or Ms. Cuevas) and her husband Luis Cuevas (Luis), filed a lawsuit against defendant, Jay M. Pensler, M.D., and his professional corporation, Jay M. Pensler, M.D.S.C., for damages arising from cosmetic surgery Dr. Pensler performed on Cuevas on September 14, 2004. Lisa Cuevas is a licensed attorney, and plaintiffs represented themselves at trial before a 12-member jury. During their deliberations, the jury twice informed the trial court it was unable to reach a unanimous verdict. The third time the jury informed the court it was at an impasse, the parties discussed and stipulated to a less-than-unanimous verdict. The jury returned a verdict in favor of defendants by an 11-to-1 vote. The court denied plaintiffs' motion for a new trial. On appeal, plaintiffs recite a cavalcade of alleged errors which they contend warrant a new trial. We find that none of the errors were sufficiently prejudicial to overturn the jury's verdict. Accordingly, we affirm.

¶ 3 BACKGROUND

¶ 4 On September 25, 2003, plaintiff Lisa Cuevas went to the office of defendant Dr. Jay Pensler in Chicago. Dr. Pensler and Cuevas discussed options for cosmetic surgery, including an abdominoplasty and breast augmentation. Dr. Pensler informed Cuevas that she would need to lose weight before he could perform the abdominal procedure. On March 18, 2004, Cuevas returned to Dr. Pensler's office and again discussed his performing an abdominoplasty and breast augmentation. Dr. Pensler agreed to perform the abdominal procedure and the breast augmentation because Cuevas had lost the required amount of weight. They scheduled the surgery for September 14, 2004. Cuevas testified that the procedure she wanted all along was a "full" abdominoplasty. Cuevas described the procedure as a "hip-to-hip abdominoplasty where

the [excess] skin above [the] umbilicus is removed and a hip-to-hip cut so that the skin is pulled down to reconnect."

¶ 5 On September 14, 2004, Dr. Pensler performed surgery on Cuevas in a surgical suite located in his office. Dr. Pensler performed the breast augmentation surgery first, and then performed the abdominal procedure. Dr. Pensler's wife and nurse, Laurie E. Pensler, assisted Dr. Pensler during both procedures. Dr. Pensler sedated Cuevas with Propofol during the breast augmentation. Dr. Pensler performed a "mini-abdominoplasty." Dr. Pensler testified that a mini-abdominoplasty only removes skin from the lower portion of the abdomen below the umbilicus. He testified that on the day of Cuevas's surgery, he pointed out to her that he could not perform a full abdominoplasty that day, and that she had more excess skin above the umbilicus that would not be addressed by a mini-abdominoplasty. Although Cuevas had excess skin above her umbilicus, Dr. Pensler testified Cuevas always wanted a mini-abdominoplasty. Dr. Pensler's medical charts contain an entry that states Cuevas chose the mini-abdominoplasty "because she did not want a long scar along the bottom of her abdomen and would accept a lesser result as a trade-off for a smaller horizontal scar."

¶ 6 Dr. Pensler released Cuevas from the surgical center in his office on the same day as the surgery. Later that day, Luis telephoned Dr. Pensler with several complaints from Lisa. Luis took Lisa to the emergency room at Northwestern Memorial Hospital in the early morning hours of September 15, 2004. On September 16, 2004, Dr. Pensler performed another surgery on Lisa and removed a hematoma from her abdomen. Lisa left the hospital the following day.

¶ 7 In April 2005, Dr. Karol Gutowski performed a full abdominoplasty on Lisa. The procedure also involved tightening Lisa's abdominal muscles. Lisa testified that the purpose of Dr. Gutowski's surgery was "to correct the surgery that Dr. Pensler did." Dr. Gutowski also removed a foreign object from inside Lisa's body.

¶ 8 The Cuevases later filed this lawsuit against Dr. Pensler and his medical corporation, presenting a host of claims. The first amended complaint alleged defendants were negligent in the following respects: (1) by performing surgery on Lisa at his office without her consent; (2) by providing false or misleading information as to the identity of the sedation provider, using a consent form which failed to advise Lisa of the identity and role of the sedation provider, failing to utilize a consent form which obtained Lisa's informed consent to allow defendant to administer sedation and by failing to properly document Lisa's medical records with the correct identity of the sedation provider; (3) administering sedation without Lisa's consent; (4) allowing his nurse to engage in the unauthorized practice of medicine by administering and monitoring Lisa's sedation and failing to obtain Lisa's consent to the administration of sedation by a nurse; (5) by releasing Lisa from care while she was oversedated; (6) by failing to instruct Lisa to receive immediate medical treatment after she reported bleeding and fainting after surgery; (7) failing to respond to complaints of postoperative bleeding, bloating, and fainting in an appropriate and timely manner; (8) by failing to perform the abdominoplasty to which Lisa consented; (9) by performing a mini-abdominoplasty without her consent; (10) by performing a surgical procedure from which Lisa could receive little or no cosmetic benefit; (11) by

performing abdominal surgery in a manner that left Lisa with a deformity requiring corrective surgery; and (12) by leaving a surgical needle in her abdomen after surgery.

¶ 9 The parties conducted discovery and engaged in various pretrial activities. On December 22, 2010, plaintiffs filed a motion *in limine* containing no less than 34 separate parts. The court granted part 34 of the motion, precluding defense counsel from presenting any evidence related to specific portions of plaintiffs' discovery request dated October 29, 2009. The discovery request related to the surgeon's standard prices for various procedures. The trial court also granted part 2 of defendants' motion *in limine*, allowing witnesses to be excluded from the trial.

¶ 10 The case was tried before a jury and proceeded to deliberations on February 17, 2011. On February 18, 2011, the court received a third note from the jury stating it was at an impasse. The court informed the parties that it would question the jury to determine if it was at an impasse and whether or not further deliberations would possibly elicit a verdict. The parties discussed agreeing to a less-than-unanimous verdict. The trial judge obtained the parties' consent to proceeding in that fashion, but informed the parties she would dismiss the jury for the day and instruct them when they returned the following Tuesday, February 22, 2011. The record does not contain the instruction the court gave to the jury when it returned after the weekend break. On February 22, plaintiffs again moved for a mistrial based on the impasse. The court responded: "In light of the recent stipulation, the Court will deny the motion for mistrial." Also on February 22, 11 jurors signed a verdict form finding in favor of defendants and against plaintiffs. The court entered a written judgment on the verdict. The trial court denied plaintiffs' motion for a new trial. This appeal followed.

¶ 11 ANALYSIS

¶ 12 I. Violations of Part 34 of the Motion *in Limine* Regarding Surgery Prices

¶ 13 Plaintiffs request a new trial because defendants violated the trial court's order which limited the use of surgery pricing information contained in plaintiffs' October 29, 2009 discovery request.

¶ 14 We begin by presenting the context which preceded the issuance of the order. Plaintiffs submitted a discovery request seeking information regarding defendants' standard charges for a variety of services and procedures. Defendants objected to producing that information. Plaintiffs' motion *in limine* sought to bar defendants from using the pricing information at trial. On December 9, 2010, the court heard argument on the parties' motions *in limine*. Counsel for defendants stated as follows:

> "MR. HALL [Defense counsel]: To make it easy for the Court, we have no intention of talking about any charges that are current. What happened in 2004 is relevant and what our doctor charged for his procedure because his bill is part of this case, his bill is part of his record, everybody had access to it. And we certainly do intend to get into costs related to 2004 surgeries."

Counsel for defendants went on to explain that the defense would introduce evidence that performing the surgery at defendants' surgery center rather than the hospital was less costly, and that patients chose the less-expensive location. The defense would introduce this evidence to rebut plaintiffs' claim defendant Dr. Pensler operated on Cuevas at the surgery center without her permission. Judge Elizabeth Budzinski–who did not preside at the later trial–had ordered

defendants to respond to plaintiffs' requests numbered one through seven (as set forth in the October 29, 2009 correspondence). The trial court struck requests 8 through 21. The court granted part 34 of plaintiffs' motion *in limine,* limiting the use of that information. The discussion surrounding this ruling proceeded as follows:

> "THE COURT: So plaintiffs' attempt to discover the charges for breast augmentation, abdominoplasty, mini abdominoplasty at the surgery center and at the hospital in 2003 and 2004 were not permitted at this–in this document am I correct?
>
> MS. PFEFFER [Defense counsel]: That's correct. ***.
>
> THE COURT: Was there ever a time that you submitted those, that information to plaintiffs' counsel?
>
> MS. PFEFFER: It was not properly requested at any time before this. ***."

Plaintiffs claim that defense counsel's opening statement, the defense witnesses' testimony, and defense counsel's closing argument all violated Judge Budzinski's order.

¶ 15 A. Opening Statement

¶ 16 We first review plaintiffs' claim that defense counsel's opening statement violated the court's *in limine* order. That review is hampered, however, because plaintiffs have failed to cite what statements in the opening statement violated the court's order. Supreme Court Rule 341(h)(7) requires an appellant's brief to include an argument containing the appellant's contentions, the reasons therefor, citation of the authorities, and the pages of the record on which

the appellant relies. Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006). Parties who fail to cite to the pages in the record relied upon in support of the contentions in its brief as required by Rule 341(h)(7) forfeit their argument. *People v. Universal Public Transportation, Inc.*, 2012 IL App (1st) 073303-B, ¶ 50. "A reviewing court is entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented, and it is not a repository into which an appellant may foist the burden of argument and research; it is neither the function nor the obligation of this court to act as an advocate or search the record for error." (Internal quotation marks and citations omitted.) *Universal Public Transportation, Inc.*, 2012 IL App (1st) 073303-B, ¶ 50. Accordingly, plaintiffs have forfeited their argument regarding the defendants' opening statement.

¶ 17 B. Testimony Regarding Surgery Prices

¶ 18 Plaintiffs also contend that certain trial testimony also violated the order. They claim they were prejudiced by these violations because they were unable to rebut the defense's assertions that the price charged to plaintiff was defendants' lower price for a mini-abdominoplasty – as opposed to a full abdominoplasty. They assert here, without citation to evidence, that defendants normally charged $4,000–the price Cuevas paid–for a full abdominoplasty and that they charged a lower price for mini-abdominoplasties. Plaintiffs also assert that polling after the verdict revealed that the jurors who found in favor of defendants believed Cuevas requested a mini-abdominoplasty rather than a full abdominoplasty because she paid the price for a mini-abdominoplasty.

¶ 19 Defendants respond that their references to the price of a mini-abdominoplasty did not violate the court's order. Defendants note that Cuevas's bill was in evidence and, therefore, witnesses could testify regarding the price of a mini-abdominoplasty. Defendants further respond that plaintiffs' own questioning placed the matter at issue and opened the door to permit Dr. Pensler to testify regarding the price of a mini-abdominoplasty. Further, they note, plaintiffs failed to object to defense counsel's closing argument and so have forfeited the issue for review. Even if the point had not been forfeited, they assert that the isolated statement by defense counsel was not prejudicial and was made in response to plaintiffs' implication Dr. Pensler performed the procedure for money.

¶ 20 Plaintiffs, in turn, respond the billing statement does not indicate that the bill was for a mini-abdominoplasty, and so plaintiffs did not actually have knowledge of defendants' going rate for a mini-abdominoplasty before trial.

¶ 21 On direct examination, defense counsel questioned Dr. Pensler as follows:

> "Q [by defense counsel]. You heard–I think it was Dr. Gutowski said–something about a bait and switch.
>
> Without getting into price, is a full abdominoplasty more expensive than a mini?"

Ms. Cuevas objected, and the trial court overruled the objection. Dr. Pensler then responded as follows:

> "THE WITNESS [Dr. Pensler]: Sure. It's substantially more.

Q [by defense counsel]. So, if you were going to over-drug a patient to pull a bait and switch, you wouldn't be doing a smaller procedure for less money, would you?

A. Well, the logic escapes me there."

¶ 22 Plaintiffs questioned Dr. Pensler as follows:

"Q [by Lisa Cuevas]. So as you look at these documents, Dr. Pensler, and you indicate that the procedure was a mini-abdominoplasty. This is six years later, you said you didn't have an independent recollection. How do you know that?

A [by Dr. Pensler]. Well, we can certainly look at the pricing form, which is where–I mean, not as though I haven't reviewed my record. But we've quoted you a price for a mini-abdominoplasty.

Q. That's not true, is it, Dr. Pensler?

A. Absolutely, that's true.

Q. That's–what you're saying now in the context of litigation but you were–we asked you for prices for your procedures. And you wouldn't give them to us, would you?"

Defense counsel objected, and the parties and court engaged in a sidebar conversation that was not recorded in the record. When the examination continued, the following exchange occurred:

"Q. And what are the procedures that are listed on this document, Dr. Pensler?

A. Under procedure?

Q. Yes.

A. Thanks. I've got it here. Bilateral breast augmentation, abdominoplasty.

Q. It doesn't say mini on this form, does it, Dr. Pensler?

A. No."

¶ 23 On the next day of trial, plaintiffs' examination of Dr. Pensler as an adverse witness continued. The following exchange occurred:

"Q [by Lisa Cuevas]. Dr. Pensler, based upon what we discussed, based upon your notes for what we discussed on our first visit, for what I said to your office in scheduling the appointment, what your office said in terms of the diagnosis, for what you billed me for and for what you wrote in your notes, what was that procedure?

A [by Dr. Pensler]. A mini-abdominoplasty. *** You were charged for a mini-abdominoplasty. There's a substantial difference in the fee between a mini-abdominoplasty–

MS. CUEVAS: Objection, your Honor. Motion to strike.

THE WITNESS: –and a full abdominoplasty.

THE COURT: Excuse me. The motion is sustained. I'm going to disregard the jury–I'm going to admonish the jury to disregard the answer. I'm going to ask that the question be asked again and answered again."

¶ 24 The court reporter read back the question, whereupon Dr. Pensler gave the following answer:

"THE WITNESS [Dr. Pensler]: Okay. Based on what I told my office for scheduling, it's clear it is a mini-abdominoplasty.

Q. Okay, Dr. Pensler, you have your file in front of you, is that right?

A. Yes.

Q. Please look in your file and tell me which document or documents make that clear, so that the jury can know. We want the jury to understand. We want them to know.

A. The billing sheet.

Q. Okay.

A. Here.

Q. Okay. So which document is it that makes the jury know for sure?

A. 9-25-03. $4,000. Abdominoplasty. That is for a mini-abdominoplasty.

* * *

Q. So that's not a full abdominoplasty–full abdominoplasty for less than $4,000?

A. I didn't–I'm sorry, I didn't catch the question.

Q. Dr. Pensler, you're not following the Court's instructions. You're misrepresenting–

MR. WALL [Defense counsel]: Objection, your Honor.

THE COURT: I need to have a sidebar, please."

¶ 25 The sidebar between the court and the parties appears in the record as follows:

"THE COURT: Okay. Your question–we're going way, way back. Your question actually said to the doctor, 'Based on what you billed me for.' He then said–

MS. CUEVAS: Your Honor, it says abdominoplasty on the billing, Your Honor. That's what I'm referring to. We know we can't talk about price. He knows it and I know it.

MR. WALL: You brought it up.

MS. CUEVAS: It's a receipt that says abdominoplasty. We know we cannot say price.

THE COURT: Counsel, I'm just telling you. 'Based on what you billed me for.' That's the phrase I wrote down. That was your question. I sustained the objection. Then your objection. I admonished the jury. The court reporter then read the question back. He stayed away from the amounts. But then you said to him, 'what document are you relying on?' He pulled out the bill right away. He's going to talk about it.

Counsel, you are treading on thin ice that you created. And I'm telling you very carefully, if you want to control this witness's testimony, then you're going to have to choose your words carefully and you're going to have to lead more

carefully. Because now you've got him in dangerous testimony, and based on your question, I don't have any reason to sustain any further objections."

¶ 26 Later in the examination, Cuevas asked Dr. Pensler about a document his secretary prepared after their initial consultation. Dr. Pensler, referring to the document, testified: "This billing sheet reflects the pricing for a mini-abdominoplasty ***." Cuevas questioned Dr. Pensler regarding the wording on the document, which stated "abdominoplasty" rather than "mini-abdominoplasty." Dr. Pensler testified: "The price clearly reflects a mini-abdominoplasty." When Cuevas asked Dr. Pensler to identify the document showing that she consented to a mini-abdominoplasty, Dr. Pensler responded that it was the pricing sheet. He stated: "The sheet that shows the specific pricing for a mini-abdominoplasty."

¶ 27 The trial court held a sidebar with counsel in which the judge stated: "For the second time, he said pricing sheet. Pricing sheet is not a consent. The gentleman is on his own agenda. I do not want to have to admonish him again." The court instructed Cuevas to preface her questions with a yes or no. The examination resumed, and Cuevas did not elicit any further testimony from Dr. Pensler regarding the cost of the procedure he performed on her.

¶ 28 "An alleged violation of an *in limine* order will warrant a new trial where the order is specific, the violation is clear, and the violation deprived [a party] of a fair trial." *Garden View, LLC v. Fletcher*, 394 Ill. App. 3d 577, 589 (2009). We first review the intent of the order granting the motion *in limine* to determine whether a violation has actually occurred. See *Fletcher*, 394 Ill. App. 3d at 590 (holding that the court could not conclude on review that violation of order *in limine* had occurred where the record was "devoid of any report of

proceedings revealing the trial court's intent when it entered the order"). Both the plain language of the order, and the intent of the order as reflected by the full record, show that the defense was to refrain from providing evidence comparing the respective prices of a mini-abdominoplasty and a full abdominoplasty. Defendants did not violate the intent of that order.

¶ 29 Cuevas herself continued to question Dr. Pensler regarding any documentation that reflected she requested a mini-abdominoplasty rather than a full abdominoplasty, and Dr. Pensler continued to refer to the billing sheet that was in evidence. The trial court specifically admonished Cuevas that she was inviting this testimony. Cuevas requested the court to admonish Dr. Pensler that he should not mention price in response to any question. The court admonished Dr. Pensler that he could not testify as to a distinction between the prices of the procedures, or give any evidence as to the prices he charged other than what was in the billing sheet. The court told Dr. Pensler that he *could* testify that the $4,000 dollar charge on the billing sheet was the charge for a mini-abdominoplasty but *could not* testify what a full abdominoplasty would have cost in 2003 and 2004.

¶ 30 Outside of the presence of the witness, Cuevas complained to the court that he should not be allowed to represent that the price charged was the price for a mini-abdominoplasty because the defense did not provide any pricing information. The trial court rejected this objection, stating:

> "THE COURT: There's a problem with that. *** We walk in the door with a document that says $4,000, abdominoplasty. That's what the bill says.
>
> MS. CUEVAS: Right. It doesn't say for a mini.

THE COURT: Because he doesn't redact that price, so the price went into evidence with the document. You have to live with that now. There's going to be discussion as to the amount of the abdominoplasty because it's been part of this.

* * *

MS. CUEVAS: And when I say–when I ask a question, 'What procedure is listed on the billing statement,' that has nothing to do with what price is on it.

***

THE COURT: You can tailor your question accordingly. *** This is a witness you can lead. 'Doctor, doesn't that billing statement say abdominoplasty? Yes or no.' "

¶ 31 Dr. Pensler testified to the price charged to Cuevas for the procedure that was performed and that the charge was for a mini-abdominoplasty. Cuevas did not object, and she proceeded to elicit testimony that the billing form on which Dr. Pensler relied listed the procedure as "abdominoplasty" and not "mini-abdominoplasty." The testimony did not violate the court's order. Moreover, plaintiffs have forfeited the issue for appeal by failing to object. *Addis v. Exelon Generation Co., L.L.C.*, 378 Ill. App. 3d 781, 795 (2007) ("Preservation of a question for review requires an objection in the court below and the failure to object constitutes waiver"). On the second day of plaintiffs' examination, Dr. Pensler again testified that the procedure he performed was a mini-abdominoplasty. When he attempted to testify that there was a substantial difference in price between a mini- and a full abdominoplasty, the court sustained plaintiffs' objection and admonished the jury to disregard Dr. Pensler's testimony. Any error caused by this

testimony was thereby cured. *People v. Hall*, 194 Ill. 2d 305, 342 (2000) ("Generally, if a timely objection is made at trial to improper interrogation, the court can, by sustaining the objection or instructing the jury to disregard the question and answer, usually correct the error") ; *Crumpton v. Walgreen Co.*, 375 Ill. App. 3d 73, 84 (2007) ("to the extent that any prejudice occurred, it was cured by the circuit court's instruction to the jury to disregard counsel's question").

¶ 32 When Dr. Pensler attempted to compare the price of mini- and full abdominoplasties, the court sustained plaintiffs' objection. The remainder of his testimony did not violate the trial court's order on the motion *in limine*. To the extent his testimony might have violated the order, we find that plaintiffs were neither prejudiced by the violation nor deprived of a fair trial by it.

¶ 33 Nor was the trial judge's decision to permit Dr. Pensler to testify that the amount he billed Ms. Cuevas was the charge for a mini-abdominoplasty an abuse of her discretion. "The decision to admit evidence rests solely within the discretion of the trial court and will not be disturbed absent an abuse of discretion." (Internal citations and quotation marks omitted.) *Foley v. Fletcher*, 361 Ill. App. 3d 39, 46 (2005). "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." (Internal citations and quotation marks omitted.) *People v. Hogan*, 388 Ill. App. 3d 885, 890 (2009). The trial court did not abuse its discretion in permitting Dr. Pensler to testify that the amount stated on the billing statement is the amount charged for a mini-abdominoplasty. The trial court's ruling was not arbitrary or fanciful. The court's reasons for permitting Dr. Pensler's testimony are clearly stated on the record. The billing statement was admitted into evidence.

¶ 34 A central issue in the case was what procedure Cuevas actually requested. The trial court reasonably permitted Dr. Pensler to testify that the bill reflects the charge for a mini-abdominoplasty. Dr. Pensler maintained that Cuevas requested a mini-abdominoplasty. Therefore, plaintiffs could not have been surprised by Dr. Pensler's testimony that he charged her for a mini-abdominoplasty. *McGovern v. Kaneshiro*, 337 Ill. App. 3d 24, 34 (2003) ("The purposes of these discovery rules 'are to avoid surprise and discourage tactical gamesmanship' "). Plaintiffs presented evidence to the jury that despite Dr. Pensler's testimony, the document itself does not state the charge was for a mini-abdominoplasty and plaintiffs presented testimony that Cuevas did not request a mini-abdominoplasty. The jurors were left to resolve the facts based on the credibility of the various items of evidence they received.

¶ 35 C. Closing Argument Regarding Surgery Prices

¶ 36 Likewise, we find that defense counsel's remark during closing argument did not rise to the level of reversible error. During closing argument, defense counsel stated as follows:

> "There's a claim here that the doctor did it for the money. You heard on opening money, money, money. She kept pointing to that. Well, you know what? Here's another inconsistency. If Dr. Evil over here is doing this for the money, why is he giving her a mini, which is less expensive than a full abdominoplasty? What sense does that make?"

¶ 37 Because plaintiffs did not object to this statement at trial, but only do so now, on appeal, they have forfeited this issue for review on appeal. *Addis*, 378 Ill. App. 3d at 795. Additionally, an improper comment that also violates a motion *in limine* does not necessarily constitute

reversible error. See *Magna Trust Co. v. Illinois Central R.R. Co.*, 313 Ill. App. 3d 375, 395 (2000) ("Violation of a motion *in limine* is not *per se* reversible error").

> "A counsel's failure to object to claimed prejudicial comments during closing argument will generally waive the issue for review. However, in some cases, a reviewing court may find plain error sufficient to overcome the waiver bar. In the context of closing arguments, our supreme court has explained:
>
> > If prejudicial arguments are made without objection of counsel or interference of the trial court to the extent that the parties litigant cannot receive a fair trial and the judicial process stand without deterioration, then upon review this court may consider such assignments of error, even though no objection was made and no ruling made or preserved thereon.
>
> The supreme court has instructed reviewing courts, when applying [this] test, to strictly apply the waiver doctrine unless the prejudicial error involves flagrant misconduct or behavior so inflammatory that the jury verdict is a product of biased passion, rather than an impartial consideration of the evidence." (Internal citations and quotation marks omitted.) *Oldenstedt v. Marshall Erdman and Associates, Inc.*, 381 Ill. App. 3d 1, 10 (2008).

¶ 38 Defense counsel's closing argument remark also does not necessitate a new trial because the remark was not sufficiently flagrant to overcome the waiver bar. The reference to the comparative cost of a mini- and full abdominoplasty was isolated and brief. "As our supreme

court made clear *** the cases in which it *** granted a new trial involved blatant mis-characterizations of fact, character assassination or base appeals to emotion and prejudice, resulting in a deterioration of the judicial process." (Internal quotation marks omitted.) *Oldenstedt*, 381 Ill. App. 3d at 13. In this case, defense counsel did not blatantly mis-characterize the facts or appeal to the jury's emotion or prejudice. Even without the stray remark or Dr. Pensler's earlier testimony, the jury could have surmised that a mini-abdominoplasty costs less than a full abdominoplasty simply by relying on life experience and common sense.

¶ 39 Here, defense counsel used the cost comparison to rebut an allegation of improper motive. The prejudicial impact of that argument must be judged in the context it was made. *Oldenstedt*, 381 Ill. App. 3d at 11 ("to invoke plain error, it is not enough *** to claim that [the statement] was not based on the evidence at trial, or that the *** argument created evidence out of whole cloth. Rather, we must determine whether the *** argument undermined the judicial process itself. We must examine the *** argument in context, keeping in mind the nature of the argument put forth ***") (Internal quotation marks omitted.). Viewed fully in context, the cost comparison did not unfairly prejudice plaintiffs and the matter simply does not rise to the level of plain error. Accordingly, the issue can be, and was, forfeited.

¶ 40 II. Misconduct by the Defense - Deposition Review

¶ 41 Next, plaintiffs argue they were prejudiced when defense counsel provided defendants' expert, Dr. McNally, with the evidence depositions of two witnesses after plaintiffs had deposed Dr. McNally. At trial, Dr. McNally opined that the object removed from Cuevas was a staple from an earlier procedure that Dr. Pensler did not perform. Plaintiffs argue that prejudice

resulted from the fact that the basis of Dr. McNally's allegedly "new" opinion was also found in plaintiffs' expert Dr. McDermott's trial testimony, which had been furnished to Dr. McNally. Plaintiffs argue the provision of the deposition was improper because they were denied an opportunity to question Dr. McNally before trial regarding his opinion and his reliance on Dr. McDermott's testimony[1]. Thereby, plaintiffs claim they were unable to prepare and cross-examine Dr. McNally regarding this particular opinion. Plaintiffs also argue that providing Dr. McNally with the evidence depositions violated the trial court's order on part 29 of plaintiffs' motion *in limine,* as well as defendants' motion to exclude witnesses. Part 29 of plaintiffs' motion *in limine* sought an order to "[p]reclude and bar defendants' expert from relying on the video evidence testimony of Dr. McDermott [plaintiffs' expert] to bolster an opinion that the foreign object observed after the surgical procedures defendant performed is a staple from prior caesarean section deliveries in 1996 and 1998 ***."

¶ 42 Defendants defend against this claim on several grounds. First, they contend that plaintiffs forfeited review of this issue in this court by failing to cite to any legal authority in support of their argument. Second, they note that plaintiffs failed to object when defense counsel initially notified plaintiffs that the defense expert would be provided with Dr. McDermott's deposition, and again failed to object when defendants moved to exclude witnesses. Third, they

[1]On December 1, 2010, defense counsel wrote a letter to plaintiffs' counsel stating that "we will be providing our expert, Dr. Randall McNally, a copy of the video evidence deposition transcript of Dr. John McDermott [plaintiffs' expert] ***." On December 6, 2010, counsel for defendants sent plaintiffs an email stating: "Dr. McNally will rely on Dr. McDermott's evidence testimony to bolster his opinion that the foreign object is a staple from one of your 2 prior c-sections and that the xray [*sic*] report of Jan 2001 showing no foreign object does not in any way rule this out."

argue that plaintiffs failed to point to any evidence that Dr. McNally's opinion changed as a result of reviewing the witnesses's evidence depositions, or to demonstrate how any such change prejudiced them. Along the same vein, they argue that plaintiffs' examination of Dr. McNally reveals no bolstering of Dr. McNally's testimony with Dr. McDermott's evidence deposition.

¶ 43 As evidence that Dr. McNally's opinion at trial was a "new" opinion based merely on Dr. McDermott's evidence deposition testimony, plaintiffs note that Dr. McNally's opinion that the foreign object was a staple was not specifically disclosed in defendants' disclosures under Illinois Supreme Court Rule 213(f)(3). Ill. S. Ct. R. 213(f)(3) (eff. Jan. 1, 1967). Plaintiffs do not, however, argue that Dr. McNally's testimony violated rule 213(f)(3). Plaintiffs only argue that his testimony–given after receiving the other doctors' depositions–was prejudicial.

¶ 44 The record, however, contains no order granting part 29 of the motion *in limine.* Plaintiffs claim the trial court granted part 29 of the plaintiffs' motion *in limine*, but they rely on only the motion itself and the trial court's order granting part 2 of defendants' motion *in limine.* On December 9, 2010, the court held a hearing on the parties' motions *in limine*, but reserved ruling on part 29 of plaintiffs' motion *in limine*.

¶ 45 Further, when plaintiffs began to question Dr. McNally about the depositions he reviewed, the trial court excused the jury and permitted plaintiffs to *voir dire* Dr. McNally as to the impact of the evidence depositions on his opinions. In a sidebar outside the presence of Dr. McNally, the court explained to Cuevas as follows:

"THE COURT: If his testimony is changed or if his opinions are changed based on any of the trial testimony that he's previously read, then those opinions can be barred.

What I have is an indication that he was provided information that he probably shouldn't have been provided under the rules of discovery. But I don't have any indication that these reading materials changed, altered, or supported his opinion in any way. And what I would be looking for is specific ways.

So I would suggest that if you're going to make a foundation for a motion to bar you question him and get the foundation in because I'm only relying upon these questions at this time."

¶ 46 Outside the presence of the jury, Cuevas questioned Dr. McNally regarding Nurse Heckman's deposition as follows:

"Q [by Cuevas]. And what I'm just requesting is that you just state what it is that you found from her deposition, what it is–how you were enlightened or what you considered in reading her deposition.

A [by Dr. McNally]. Well, it confirmed some of the points of your progress from the time–she wasn't there every moment that you were there from whatever that was, 2:00 in the morning until–until you were transferred to a hospital bed and then the next date of surgery.

But I'm not positive as to what hours she encompassed. I believe it was that first day."

¶ 47 Ms. Cuevas, continuing outside the presence of the jury, also asked Dr. McNally whether his trial testimony included an opinion as to the nature of the foreign object removed from her body and the impact of Dr. McDermott's evidence deposition on that opinion. The relevant portions of the colloquy are as follows:

"A [by Dr. McNally]. In my opinion I stated that it was a staple.

Q [by Cuevas]. And you based your opinion upon the–

A. What it looked like on that one X-ray that I visualized and that it was not a–not a needle. It was not the shape of a needle in any way.

Q. And you read the deposition–you read a deposition that you got from Dr. McDermott, correct?

A. Yes.

Q. And what did you–in terms of your opinion, what did you conclude after reading that deposition?

A. Sitting here right now, I'm not sure. I know at some time he said it was a needle. And I don't agree with that at all.

Q. *** [W]hat, if any, impact did reading Dr. McDermott's deposition have on your opinion?

A. That was hi–that was his opinion.

Q. ***

Did you feel that Dr. McDermott's deposition, the one that you read after your deposition, did you feel that that helped to bolster your testimony here in any way as to the foreign object?

* * *

THE WITNESS [Dr. McNally]: I don't think it bolstered my opinion. It just clarified his view which is inconsistent with mine."

¶ 48 The trial court denied plaintiffs' motion to bar Dr. McNally's testimony without prejudice, thereby resolving part 29 of plaintiffs' motion *in limine.* The court made an oral finding and cautioned the witness outside the presence of the jury. The trial court stated as follows:

"THE COURT: At this juncture I find that there hasn't been any alteration of this doctor's opinion with respect to the additional materials ***.

* * *

THE COURT: The questioning that I've heard and the answers that I've heard so far is that there was no alteration of your opinions because of those depositions.

THE WITNESS [Dr. McNally]: There is not.

THE COURT: Okay. If at any time during this inquiry, direct or cross-examination, you find that not to be the case, you must designate to the Court that you need a conference.

THE WITNESS: Now, I understand."

¶ 49 Plaintiffs' argument that this ruling was erroneous and prejudicial lacks merit. "A trial court's ruling on a motion *in limine* addressing the admission of evidence will not be disturbed on review absent a clear abuse of discretion." *Sbarboro v. Vollala*, 392 Ill. App. 3d 1040, 1055 (2009). "Admission at trial of evidence which should have been disclosed through discovery is not reversible error absent proof that it resulted in prejudice. As the imposition of sanctions for failure to comply with discovery rules lies within the trial court's discretion, this court will not reverse the trial court's decision absent a clear abuse of discretion." (Internal citation omitted.) *Sbarboro*, 392 Ill. App. 3d at 1053. "An abuse of discretion occurs when the ruling is arbitrary, fanciful, or unreasonable or when no reasonable person would take the same view." (Internal citation omitted.) *Sbarboro*, 392 Ill. App. 3d at 1055.

¶ 50 The trial court did not abuse its discretion because Dr. McNally's testimony did not unfairly prejudice plaintiffs. Plaintiffs were able to question Dr. McNally to elicit whether the improperly-provided depositions influenced his opinion expressed at trial. Having done so, plaintiffs failed to establish that the depositions influenced his opinion. Moreover, Dr. McNally gave an opinion at trial based on an image that was displayed to the jury. At trial, Dr. McNally testified that he reviewed Dr. Gutowski's records, including Exhibit 23, which was an image from Dr. Gutowski's records. Defense counsel displayed Exhibit 23 to the jury and asked Dr. McNally if he had an opinion as to the nature of the foreign object depicted in Exhibit 23. Plaintiffs did not object. Dr. McNally stated "I believe it's a staple, a surgical staple." Defense counsel asked–without objection– if the object appeared to be a needle in Dr. McNally's opinion. Dr. McNally responded "It does not appear to be a needle." Dr. McNally then went on to

describe the bases of his opinion that the object depicted in the image is not a needle. Dr. McNally described–again without objection–what a surgical needle would look like if it were depicted in the image and how it would differ from a staple.

¶ 51 The jury could assess Dr. McNally's opinion based on their own direct observation of the image on which he based his opinion and his testimony. Plaintiffs did not question Dr. McNally regarding his opinion that the object depicted in Exhibit 23 appeared to be a staple rather than a needle.

¶ 52 In sum, the trial court's admission of this testimony did not unfairly prejudice plaintiffs, because the jury had a fair opportunity to assess the weight of Dr. McNally's testimony, and plaintiffs had an opportunity to challenge his opinion but failed to do so. Therefore, plaintiffs are not entitled to a new trial on this basis.

¶ 53 III. Courtroom Conduct by Defendant Dr. Pensler

¶ 54 Plaintiffs also argue they were prejudiced when Dr. Pensler left the witness stand to retrieve and review his deposition transcript during his cross-examination, and by his having direct communication with a member of the jury during the trial. When the parties returned to the courtroom from a sidebar, the following exchange occurred:

> "THE WITNESS [Dr. Pensler]: Sorry. I took this from my–
>
> THE COURT: Counsel, approach please.
>
> THE WITNESS: It's my deposition.

THE COURT: Dr. Pensler has informed me that during the break, he retrieved the deposition. He is now re-tendering it to counsel. We're going to continue with the examination. We'll deal with this later."

¶ 55 When the court excused the jury for lunch, the trial judge informed the parties as follows:

"THE COURT: I asked my clerk why Dr. Pensler got up.

My clerk informed me that Dr. Pensler got up, walked to the table, retrieved the deposition, and walked back.

***

So the first issue is: Dr. Pensler, when you're under oath and you're in the witness stand, you do not leave the witness stand.

***

THE COURT: Second is that one of the jurors asked if she could go to the rest room and that question was directed at my sheriff, and apparently you answered the question. You're to have no colloquy with the jurors at any time."

The court then adjourned the proceedings for lunch. Later that day, plaintiffs moved for a mistrial based on Dr. Pensler's conduct. The trial court reserved ruling on the mistrial motion.

¶ 56 First, plaintiffs assert they were prejudiced by Dr. Pensler's conduct because, by reviewing his transcript, he could prepare for and rebut additional impeachment and avoid impeachment by conforming his trial testimony to his deposition testimony. Second, plaintiffs argue they were prejudiced by Dr. Pensler answering the juror's question. They contend that because the trial judge failed to ask the jurors what effect Dr. Pensler's conduct and juror

communication had on them, or to instruct the jurors that Dr. Pensler's conduct was improper, that she judicially ratified his indecorous conduct and coated his testimony with a gloss of favorable partiality.

¶ 57 Defendants present four responses to the new trial claim stemming from this conduct: (1) plaintiffs failed to support their argument with citation to legal authority; (2) they presented no evidence they were prejudiced by the conduct; (3) Dr. Pensler's conduct and his limited jury contact were not sufficient to rise to the level of prejudice warranting a new trial; and (4) plaintiffs only presumed Dr. Pensler would have testified differently from his deposition testimony had he not retrieved the deposition.

¶ 58 Plaintiffs claimed that a postverdict jury poll revealed that Dr. Pensler told the jury he was checking his deposition to "see what was coming next." Plaintiffs also claim that a jury poll revealed that the juror who communicated with Dr. Pensler told him that she felt squeamish during *voir dire*. However, the record contain no such jury poll responses. Plaintiffs' citation to the record for this claim does not support their contention that a juror told Dr. Pensler she felt squeamish, nor does it conclusively demonstrate that Dr. Pensler read his deposition transcript during the sidebar. Nonetheless, in its written order denying plaintiffs' motion for a new trial, the trial court found that "Dr. Pensler was reviewing his deposition when the court reconvened and [his conduct was] discovered."

¶ 59 Illinois no longer categorically presumes prejudice when there is outside contact with a juror. *People v. Ward*, 371 Ill. App. 3d 382, 405 (2007). "[T]he question of whether jurors have been influenced and prejudiced to such an extent that they would not, or could not, be fair and

impartial involves a determination that must rest in sound judicial discretion." *People v. Runge*, 234 Ill. 2d 68, 104 (2009). The trial court properly denied plaintiffs' motion for a mistrial based on Dr. Pensler's conduct, finding that "it was determined that the misconduct on the part of defendant during the sidebar was not so egregious as to influence the jury in any manner." The trial court did not abuse its discretion in finding no prejudice form Dr. Pensler's conduct.

> "The trial judge's discretion clearly extends to the initial decision of whether to interrogate jurors. The applicable standard of review, after the trial judge has made an appropriate inquiry, is an abuse of discretion standard, which recognizes that the trial court has wide discretion in deciding how to handle and respond to allegations of juror bias and misconduct that arise during a trial. *** The most controlling facts or circumstances involve the character and nature of the allegedly prejudicial information or acts." (Internal citations omitted.) *Runge*, 234 Ill. 2d at 105-106.

¶ 60 The plaintiffs also complain about Dr. Pensler's allegedly prejudicial act of speaking to a juror about using the restroom. We find that act was innocuous and insufficient to conclusively show prejudice. The trial court was not bound to automatically declare a mistrial, but could have conducted a hearing to determine the facts and assess the impact of Dr. Pensler's conduct on the jury. However, the court was not required to conduct a hearing. "[T]he extraneous communication to the juror must be of a character that creates a reasonable suspicion that further inquiry is necessary to determine whether the defendant was deprived of his right to an impartial jury. How much inquiry is necessary (perhaps very little, or even none) depends on how likely

was the extraneous communication to contaminate the jury's deliberations." (Internal citations omitted.) *Ward*, 371 Ill. App. 3d at 404.

> "In determining whether to conduct a hearing in a case such as this, the court must balance the probable harm resulting from the emphasis such action would place upon the misconduct and the disruption involved in conducting a hearing against the likely extent and gravity of the prejudice generated by that misconduct. *** The trial court *** must enjoy a broad discretion in these matters." *Ward*, 371 Ill. App. 3d at 399.

¶ 61 The trial court did not abuse its discretion in determining that no inquiry was necessary after a juror asked the courtroom guard if she could use the restroom during a sidebar, and Dr. Pensler answered the question. Any further inquiry would have only unnecessarily acknowledged and accentuated the communication. See *Ward*, 371 Ill. App. 3d at 399. The trial court made a conscientious judgment that the disruption in the trial that such an inquiry would have caused, wherein time was already a factor, outweighed the "likely extent and gravity of the prejudice generated by [the] misconduct."

¶ 62 Nor did the trial court abuse its discretion in denying plaintiffs' motion for a mistrial based on Dr. Pensler retrieving his deposition. Plaintiffs have in fact shown no prejudice from Dr. Pensler's misconduct. Plaintiffs' complaints that the misconduct, and the court's subsequent failure to further highlight the conduct, demonstrated to the jury that the court did not believe plaintiffs' case to be serious, or sided with the defendant, are nothing more than speculation. See *Ward*, 371 Ill. App. 3d at 402 ("in light of the *** nature of [the] communication, here, *** we

can only find the creation of a 'suspicion of impartiality,' insufficient to warrant any relief to defendant").

¶ 63 IV. Admission of Photograph

¶ 64 Plaintiffs argue that the trial court erred in refusing to admit plaintiffs' exhibit 57F, which is a photograph showing the tissue removed from Cuevas's abdomen after Dr. Gutowski's surgery. During a hearing regarding trial exhibits, defense counsel objected to plaintiffs' exhibit 57F. Counsel explained as follows:

> "MR. WALL [Defense counsel]: Our objection on 57F was made earlier in the case that this represents intraoperative or post-operative tissue removed by Dr. Gutowski and his subsequent procedure. The photograph has some kind of red band on it.
>
> It's very gruesome and graphic and we object to relevancy as well as possible prejudicial nature on the jury showing an intraoperative photograph of a surgery that's not in question.
>
> * * *
>
> MS. CUEVAS: *** This photo shows and supports Dr. Gutowski's testimony and mine, first of all mine, that I never ever consented to, had no purpose to consent to a mini-abdominoplasty that would leave me with 4 pounds of gut when I'm trying to get rid of it. This is what was taken away.
> And also that nothing was done basically. ***"

¶ 65 On appeal, plaintiffs argue the photograph was admissible as evidence of the amount of tissue that still had to be removed from Cuevas's abdomen after Dr. Pensler allegedly performed the incorrect surgery. Plaintiffs argue that the photograph was relevant, material, and probative, and they claim that without the photograph "it would be hard for any trial witness to describe to the jury how much tissue was left after defendant's negligent procedure." Plaintiffs argue the lack of the photograph prejudiced them because defense counsel used the ruling to mislead the jury by arguing that Dr. Gutowski intentionally failed to photograph the surgical site prior to Cuevas's subsequent surgery. Plaintiffs assert the defense argued that if a photograph had been taken before Cuevas's second surgery, it would have supported defendants' clam that Dr. Pensler's surgery improved Cuevas's appearance.

¶ 66 Defendants initially respond that plaintiffs forfeited this argument on appeal by failing to support the argument in their post-trial motion. On the merits, defendants note that other photographs admitted into evidence, along with Dr. Gutowski's testimony describing the procedure he performed on Cuevas, allowed plaintiffs to present a comprehensive description of the nature and amount of tissue Dr. Gutowski removed. Therefore, defendants submit, the court did not abuse its discretion in allowing plaintiffs to use exhibit 57F, but refusing to publish it to the jury in light of the other evidence on the issue and the prejudicial nature of exhibit 57F.

¶ 67 The trial court's order denying plaintiffs' post-trial motion regarding the photograph states as follows:

> "Plaintiffs proffer numerous other incidents which occurred during trial that purportedly denied them of a fair hearing, including: *** refusal to admit certain

> photographic exhibits ***. The court has searched the court files, the record that has been provided, as well as its notes, and fails to find reference to, or support for, the remainder of plaintiffs' arguments. *** Accordingly, these claims of error cannot be sustained."

¶ 68 Defendants incorrectly rely on Supreme Court Rule 366(b)(iii) (Ill. S. Ct. R. 366(b)(iii) (eff. Feb. 1, 1994)) to argue plaintiffs' failure to support this claim with record evidence in their post-trial motion forfeits the argument on appeal. That rule states that: "A party may not urge as error on review of the ruling on the party's post-trial motion any point, ground, or relief not specified in the motion." Ill. S. Ct. R. 366(b)(iii) (eff. Feb. 1, 1994). The record shows that plaintiffs did, in fact, urge the decision not to admit exhibit 57F as a ground for relief in the post-trial motion, but failed to demonstrate to the trial court that the record supported a right to relief. Nonetheless, in this court, plaintiffs' failure to point to that portion of the record that demonstrates the trial court's error *is* fatal to their claim. *In re Alexander R.*, 377 Ill. App. 3d 553, 557 (2007) ("it is usually the appellant's burden to affirmatively demonstrate error from the record").

¶ 69 Plaintiffs have failed to affirmatively demonstrate the trial court's error. The trial court did not refuse admission of the photograph based on relevancy. Instead, the trial court found that the prejudicial impact of the photograph *might* outweigh its probative value, especially in light of the numerous other ways plaintiffs could demonstrate the amount of tissue subsequently removed from Cuevas's abdomen–the only purpose for which they sought to admit the photograph. Even so, the trial court did not exclude the photograph. The trial court reserved ruling on the

photograph during the pretrial conference on exhibits. The court found that the photograph was relevant, but expressed concern with its "gruesomeness." The court specifically ruled that the photograph could be admitted *if* a proper foundation was laid. The court explained its ruling was that the photograph would not go to the jury if the court found it prejudicial, inflammatory, or too gruesome. The court explained it was specifically reserving ruling on whether the photograph could be published to the jury but that Dr. Gutowski would be allowed to use the photograph in his testimony.

¶ 70 Plaintiffs do not point to any portion of the record wherein (1) Dr. Gutowski testified using the photograph, (2) plaintiffs attempted to lay a foundation to admit the photograph with any witness, or (3) plaintiffs requested to admit exhibit 57F into evidence or to publish it to the jury.

¶ 71 Further, plaintiffs' claim of prejudice from not having the photograph in evidence is not supported by the record. Plaintiffs point to no evidence suggesting that Dr. Gutowski intentionally failed to take certain photos to hide an improvement in Cuevas's appearance. Nothing in defense counsel's questioning of Dr. Gutowski implies any intentional attempt by plaintiffs to hide evidence.

¶ 72 Further, the record before this court demonstrates that plaintiffs suffered no prejudice from not having exhibit 57F admitted into evidence. Plaintiffs' stated purpose for the admission of exhibit 57F was to substantiate plaintiffs' claim that, after Dr. Pensler's surgery, "excess tissue, scarring, and deformity remained." Cuevas questioned Dr. Gutowski regarding exhibit 57E, which he described as depicting the result of *his* surgery on her. Cuevas asked Dr.

Gutowski to explain his surgery. Dr. Gutowski described his surgery. Cuevas showed Dr. Gutowski exhibit 56D and 57C, which he testified were pictures after Dr. Pensler's surgery and after his own surgery. Her examination proceeded in pertinent part as follows:

"Q [by Cuevas]. Did you remove a little more skin in the abdominoplasty that you performed?

A [by Dr. Gutowski]. I removed a lot more skin.

Q. And when you say a lot more skin, you mean how much skin?

A. If you divide the abdomen into thirds *** it would be the skin from the belly button down to the pubic area ***.

* * *

Q. At any time before you performed that surgery, did my abdomen flatten out?

A. No.

Q. So the mass of tissue is still here?

A. If it had flattened out, we wouldn't have needed to have done an abdominoplasty. It wouldn't have flattened out because the muscles were never tightened."

¶ 73 Based on this testimony, plaintiffs were not deprived of an opportunity to demonstrate to the jury the amount of tissue that remained after Dr. Pensler's surgery, which is all Exhibit 57F depicts. Therefore, plaintiffs suffered no prejudice and they are not entitled to a new trial on this basis.

¶ 74 V. Denial of a Mistrial Based on Hung Jury

¶ 75 Plaintiffs contend the trial court erred in denying their renewed motion for a mistrial based on an alleged stipulation to a less-than-unanimous verdict. On February 18, 2011, the trial court received a note stating the jury was at an impasse. The court read Illinois Pattern Jury Instruction 1.05 to the jury. The instruction reads as follows:

> "The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree to it. Your verdict must be unanimous.
>
> It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But, do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.
>
> You are not partisans. You are judges--judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case." Illinois Pattern Jury Instructions, Civil, No. 1.05 (2008).

¶ 76 After the court so instructed the jury, Cuevas stated as follows:

> "The plaintiffs would just like to renew our motion for a mistrial on the grounds of the defendant's misconduct in leaving the witness stand during the time he was being impeached, while the Court was out for a sidebar and reviewing his deposition testimony, and his misconduct, and having inappropriate contact with jurors, his audibles [*sic*] from counsels' table during the course of the trial. And also, based upon defense counsel's misconduct in submitting the evidentiary depositions of the two witnesses to his expert witness for review and consideration for his trial testimony.
>
> And the plaintiff would like to move for mistrial with cause."

¶ 77 The trial court reserved ruling on plaintiffs' motion. The court stated:

> "Since we are not in a situation where any of the issues have changed at the time that they were submitted to me, an argument as to the cumulative effect and behavior will still be entertained. But right now it is reserved."

¶ 78 Later, the court received a third note from the jury stating it was at an impasse. The court informed the parties that it would question the jury to determine if it was at an impasse and whether or not further deliberations would result in a verdict. Before the jury returned to the courtroom, the parties discussed agreeing to a less-than-unanimous verdict. The trial court obtained the parties' consent to proceeding in that fashion, but informed the parties it would dismiss the jury for the day and instruct it when they returned the following Tuesday, February 22, 2011. The court's instruction to the jury upon returning to further deliberate is not contained in the record.

¶ 79 When the trial resumed on February 22, plaintiffs again moved for a mistrial based upon Dr. Pensler's misconduct in having verbal contact with jurors, leaving the witness stand during the side bar and retrieving his deposition, and based on defense counsel's having provided defendants' expert witness with the two evidence depositions. The transcript of the motion to reinstate the motion for a mistrial does not reveal that plaintiffs' renewed presentation was specifically precipitated by the jury's impasse. The trial court responded: "Your motion is noted. In light of the recent stipulation, the Court will deny the motion for mistrial."

¶ 80 Plaintiffs characterize the court's ruling as a finding that plaintiffs waived their motion for a mistrial by entering the stipulation. Plaintiffs argue that the trial court improperly denied their motion based on the stipulation, because the stipulation did not address the other claims of error plaintiffs raised in the motion. In ruling on plaintiffs' post-trial motion, the trial court found as follows:

> "Plaintiffs argue that the motion for mistrial should have been ruled upon before they entered into the agreement to accept a less-than-unanimous verdict. The court relies only upon its notes; no transcript to support plaintiffs' position has been tendered. Any objection to the court's denial of the motion for mistrial, predicated upon the jury's failure to reach a verdict was waived with the agreement to accept a less-than-unanimous verdict."

¶ 81 We cannot discern what transcripts were available to the trial court, but the record in this court states that the trial court *denied* plaintiffs' motion. The trial court's order denying plaintiffs' post-trial motion does not find plaintiffs *waived* the motion for a mistrial – merely that

they waived any objection to the court's earlier denial of it. Moreover, the written order denying plaintiffs' post-trial motion states plaintiffs waived any objection to the denial of the motion for mistrial by entering the stipulation *after* the court denied the motion. The trial court's order denying the reinstated motion for a mistrial was not an abuse of discretion.

¶ 82 Even had plaintiffs moved for a mistrial based on the jury's inability to reach a verdict, we would find that a denial of the motion would not be an abuse of discretion. *In re Commitment of Kelley*, 2012 IL App (1st) 110240, ¶ 49 ("The decision to declare a mistrial lies within the discretion of the court, and a mistrial should be declared only if there is some occurrence at trial of such a character and magnitude that the party seeking a mistrial is deprived of a fair trial").

> "The court's judgment will not be disturbed unless this discretion is shown to be clearly abused, even though the jury had earlier indicated it was hopelessly deadlocked. The trial court is not required to accept a jury's assessment of its own ability to reach a verdict or to declare a mistrial merely because the jurors have not been able to come to a unanimous verdict immediately. In determining how long a jury should be permitted to deliberate before a mistrial is declared and the jury is discharged, no fixed time can be prescribed, and great latitude must be accorded to the trial court in the exercise of its informed discretion. There is no mechanical formula that can be applied because a trial court's ruling on a motion for mistrial is grounded in the unique facts of the particular case in which the

ruling was made." (Internal quotation marks and citations omitted.) *People v. Willmer*, 396 Ill. App. 3d 175, 180 (2009).

¶ 83 On February 18, 2011, before the parties entered the stipulation, the trial court instructed the jury consistently with the mandate in *People v. Prim*, 53 Ill. 2d 62 (1972). *Prim* requires trial courts faced with deadlocked juries to comply with the standards suggested by the American Bar Association (ABA) Minimum Standards Relating to Jury Trials. *Prim*, 53 Ill. 2d at 76. The *Prim* court quoted an instruction that is illustrative of an instruction consistent with the ABA standards. *Prim*, 53 Ill. 2d at 75-76. "The directive to the trial courts and the instruction framed in *Prim* was aimed primarily at eliminating supplemental instructions to the jurors to 'heed the majority' as a means of securing a verdict." *People v. Gregory*, 184 Ill. App. 3d 676, 681 (1989). Illinois Pattern Jury Instruction 1.05 tracks the instruction framed in *Prim*.

¶ 84 Later on February 18, before the trial court questioned the jury as to whether it was still at an impasse, the parties entered the disputed stipulation. Under these facts, "[t]he trial court soundly exercised its discretion in directing the jury to continue its deliberations. It cannot be realistically argued that the trial court coerced the jury into returning a verdict." *People v. Daily*, 41 Ill. 2d 116, 121-22 (1968).

¶ 85 VI. Instruction Regarding Unanimous Verdict

¶ 86 That brings us to the parties' dispute over the less-than-unanimous verdict. On February 22, 2011, the parties signed and the court entered a handwritten order, reading as follows:

"This matter coming to be heard for jury trial & trial having been held, and the jury having started their deliberations with no verdict having yet been reached,

> it is hereby agreed & stipulated between the parties that the parties have agreed to accept a unanimous verdict of 10 or more jurors." (Underlining in original.)

¶ 87 The record contains conflicting information regarding the parties' agreement to accept a jury verdict of less than twelve to zero. The written order, which is self-contradictory and hardly a model of draftmanship, states that the verdict must be "unanimous". Plaintiffs rely on that written order, contending that they had agreed only to verdicts of 10-0, 11-0, or 12-0, but not to verdicts of 10-2 or 11-1. The written order is fairly consistent with the practice of permitting a defendant to stipulate to proceed to a verdict with fewer than 12 jurors if a juror becomes unable to serve after the jury has retired to deliberate, thus permitting a 10-0 or 11-0 verdict – but that problem was not present here. See *People ex rel. Birkett v. Dockery*, 235 Ill. 2d 73, 77 (2009) (and cases cited therein). The transcript of the discussions leading up to the entry of the order, however, sheds light on the mystery.

¶ 88 The parties' oral stipulation was much less ambiguous than the written order. More importantly, the record clearly sets forth the trial court's *order* that it would instruct the jury that the parties would accept a less-than-unanimous verdict. "If there is a conflict between a trial court's written and oral orders, the oral order controls." *In re Tr. O.*, 362 Ill. App. 3d 860, 868 (2005). See also *People v. Whalum*, 2012 IL App (1st) 110959, ¶ 41 ("Although a written order of the circuit court is evidence of the judgment of the circuit court, the trial judge's oral pronouncement is the judgment of the court").

¶ 89 Plaintiffs rely on section 2-1105 of the Code of Civil Procedure (735 ILCS 5/2-1105 (West 2010)) as the source of their statutory right to a unanimous verdict by all remaining jurors.

Section 2-1105, however, does not give plaintiffs that right. Section 2-1105 provides that "[a] plaintiff desirous of a trial by jury must file a demand therefor with the clerk at the time the action is commenced." 735 ILCS 5/2-1105(a) (West 2008). Our supreme court has found that "this section of the Code of Civil Procedure merely provides the process by which a party may advise the court of its desire for a jury trial, and says nothing about whether a party is entitled to a jury trial in any given action." *Bowman v. American River Transportation Company*, 217 Ill. 2d 75, 95 (2005). The statute also contains no language regarding a unanimous verdict.

¶ 90 Regardless, the Illinois constitution provides that the right of trial by jury as heretofore enjoyed shall remain inviolate. Ill. Const. 1970, art. I. § 13. Our supreme court has held that "[i]t is clear from the committee proposals, the floor debates, and the explanation to the voters" of the Sixth Illinois Constitutional Convention that "this section is the same as Article II, Section 5 of the 1870 Constitution" and that "there was no intent to change trial by jury as that right was enjoyed in this State at the time of the 1970 constitutional convention." (Internal quotation marks omitted.) *People v. Joyce*, 126 Ill. 2d 209, 215 (1988). "The right of trial by jury constitutionally guaranteed is the right as it existed at common law and as it was enjoyed at the time of the adoption of the present constitution. It is the right to have the facts in controversy determined, under the direction and superintendence of a judge, by twelve impartial jurors who possess the qualifications and are selected in the manner prescribed by law. The jury's verdict must be unanimous, and it is conclusive, subject to the right of the judge to set it aside if in his opinion it is against the law or the evidence, and for that reason to grant a new trial." (Internal quotation marks and citations omitted.) *Read v. Friel*, 327 Ill. App. 532, 536 (1946). See also

People v. McGhee, 2012 IL App (1st) 093404, ¶ 24 ("Like the right to a trial by an unbiased jury, the right to a unanimous verdict is among the most fundamental of rights in Illinois").

¶ 91 The question here, however, is not whether plaintiffs had a right to a unanimous verdict of the remaining jurors, but whether they waived that right.

> "Individuals may waive substantive rules of law, statutory rights and even constitutional rights. *** To be a valid waiver of a constitutional right, it must be shown that there was an intentional relinquishment or abandonment of a known right. The waiver must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." (Internal quotation marks and citations omitted.) *Smith v. Freeman*, 232 Ill. 2d 218, 228 (2009).

¶ 92 The record demonstrates that plaintiffs waived their right to a unanimous jury verdict. Before the court returned the jury to the courtroom, the following exchange occurred:

> "MR. WALL [Defense counsel]: Judge, just if I could, I don't know if there's any willingness to go with less than unanimous, as an alternative to a hung jury.
>
> THE COURT: We should probably discuss this now.
>
> The difficulty with that is that at some point in time, I believe we'd have to advise the jury that they could return a verdict form without a unanimous group. And I frankly never had that situation before. Do I then tell the jury? In your

experience, does the judge advise the jury that they'll accept a verdict less than twelve?

MR. WALL: Yeah. I mean, whatever the stipulation is, if it's less than twelve but at least ten for the side they choose, whatever the stipulation is, then they can fill out the verdict that way.

THE COURT: Well, let's hear whether or not they're hung before I make that decision or I ask you to make that decision."

¶ 93 The jury returned to the courtroom and the foreperson informed the trial court the jury remained at an impasse. The foreperson did not believe that additional deliberations would bring forth a verdict. The court then asked for a sidebar with the parties. The colloquy in the sidebar was as follows:

"THE COURT: This is real easy. A yes or no. Do you want to entertain a stipulation of less than twelve?

MR. WALL: We would agree to a stipulation–

THE COURT: I'm smiling. I said yes or no.

MR. WALL: –of less than twelve but at least ten. Ten or more--

THE COURT: Okay.

MR. WALL: –we would go with.

THE COURT: Okay. Plaintiffs, do you want to entertain a stipulation for less than twelve? Yes or no.

MS. CUEVAS: Ten or more? As long as we have a verdict of ten or more?

MR. CUEVAS: Do you want to do that?

MS. CUEVAS: Yes.

MR. CUEVAS: That's fine.

MS. CUEVAS: Yes, we can do that.

THE COURT: You want ten or more?

MS. CUEVAS: Yes.

THE COURT: Ten or more?

MR. WALL: Yes.

THE COURT: I'm going to advise the jury, then, that the parties have agreed to a less-than-unanimous verdict. I'm going to dismiss them for the night, and I'm going to require them to be back here at 9:30 on Tuesday.

MR. WALL: Will you tell them that in addition to the parties stipulating to less than unanimous, that as long as it is ten to two, eleven to one, or twelve to nothing, that that's our stip?

THE COURT: That instruction should be given to them on Tuesday.

MR. WALL: Okay.

THE COURT: I don't believe that's an instruction that should be given to them now.

MR. WALL: Okay.

THE COURT: Okay? Okay. Let's go."

¶ 94 The court proceeded to address the jury as follows:

"THE COURT: Ladies and gentlemen of the jury, the parties have stipulated that they will accept from you a less-than-unanimous verdict. That will mean that you will have to be further instructed.

So at this juncture, I'm going to adjourn, dismiss you for the evening, and require you to return on Tuesday at 9:30, upon which you'll get further instructions and you'll continue your deliberations."

¶ 95 The trial court clearly stated its intention to instruct the jury that the verdict did not have to be unanimous. Defense counsel clarified that the stipulation was to a non-unanimous verdict of less than 12, but to a verdict of at least 10-to-2. Plaintiffs did not include the trial court's subsequent instruction to the jury in the record. Nonetheless, because the court entered a judgment based on a verdict signed by 11 of the 12 jurors, we must presume the trial court actually did instruct the jury as defense counsel clarified. This interpretation is further bolstered by the fact that no juror was missing or unavailable, which fact would have raised the possibility of a 10-0 or 11-0 verdict.

¶ 96 Because plaintiffs neither objected nor indicated to the trial court that defense counsel's statement did not reflect their understanding of the stipulation, they have waived the issue. "The rule of invited error or acquiescence is a form of procedural default also described as estoppel. The rule prohibits a party from requesting to proceed in one manner and then contending on appeal that the requested action was error. The rationale for the rule is that it would be

manifestly unfair to grant a party relief based on error introduced into the proceedings by that party." (Internal citations omitted.) *Gaffney v. Board of Trustees of Orland Fire Protection District*, 2012 IL 110012, ¶ 33. Plaintiffs acquiesced in the trial court's procedure. *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶ 19 ("A party forfeits the right to challenge a jury instruction that was given at trial unless it makes a timely and specific objection to the instruction and tenders an alternative, remedial instruction to the trial court"). *Cf. Gaffney*, 2012 IL 110012, ¶ 34. Despite the infelicitous wording of the written order on this issue, plaintiffs cannot now complain that the trial court proceeded improperly.

¶ 97 Nor does the court's instruction amount to plain error. *People v. Blair*, 379 Ill. App. 3d 51, 60 (2008) ("Where there is no error, there can be no plain error"). The record amply demonstrates that the parties intended to proceed with an 11-1 jury verdict. Plaintiffs did not object when defense counsel stated, and the trial court agreed, that the verdict could be "ten to two, eleven to one, or twelve to nothing." The record does not support finding that a "clear and obvious error occurred."

¶ 98 CONCLUSION

¶ 99 Throughout this order, we have examined various contentions of error which plaintiffs renewed and summarized in their motion for a mistrial. Because we have found each individual error to be non-prejudicial, we cannot find that the case should be retried.

¶ 100 Plaintiffs were entitled to a fair trial, not to a perfect trial, for there are no perfect trials. *Runge*, 234 Ill. 2d at 126. The jury reached its verdict after 13 days of trial, hearing from at least six witnesses, and after three days of deliberation. On appeal, plaintiffs complain merely about a

few isolated errors in an extensive trial. No new trial is required in those circumstances. See *Cretton v. Protestant Memorial Medical Center, Inc.*, 371 Ill. App. 3d 841, 863-64 (2007) ("as explained in great detail above, we have found no prejudicial errors on the part of the trial court. Accordingly, in the absence of even one prejudicial error, we decline to conclude that cumulative error mandates a new trial").

¶ 101 Plaintiffs have failed to demonstrate a right to relief based on alleged violations of the trial court's orders on motions *in limine*, the conduct of the defense, the admission of evidence at trial, or the court's instruction to the jury regarding the parties' stipulation to a non-unanimous verdict. Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 102 Affirmed.