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2026 IL App (3d) 240068-U

Order filed November 4, 2026

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2026

SHARON SCOTT,	)	
	)	Appeal from the Circuit Court
Plaintiff-Appellant,	)	of the 12th Judicial Circuit,
	)	Will County, Illinois.
v.	)	
	)	Appeal No. 3-24-0068
	)	Circuit No. 19 L 129
YONG J. KIM, M.D. and	)	
BOLINGBROOK WOMEN'S CLINIC,	)	The Honorable
a corporation,	)	Barbara N. Petrungaro,
	)	Judge, Presiding.
Defendants-Appellees.	)	

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Peterson and Davenport concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err when it (1) denied the plaintiff's motion for a directed verdict on the issue of comparative negligence or (2) instructed the jury on the issue of comparative negligence. Any impropriety in defense counsel's closing argument did not deprive the plaintiff of a fair trial, and the defense expert did not improperly comment on the credibility of a witness.

¶ 2 The plaintiff, Sharon Scott, filed a civil lawsuit against her former doctor and his practice, alleging medical malpractice after she developed breast cancer. A jury returned a

general verdict in favor of the defendants, and the plaintiff appeals, claiming (1) the court erred by denying her motion for a directed verdict on the issue of comparative negligence and, later, instructing the jury on the defense's theory of comparative negligence, (2) defense counsel made improper remarks during closing arguments, and (3) the defendants' expert offered improper testimony.

¶ 3 I. BACKGROUND

¶ 4 Scott was treated by Dr. Yong Kim, an obstetrician and gynecologist, from 2004 until his retirement in 2017. Scott had a strong family history of cancer. Her mother died of breast cancer when Scott was 10 years old, and her sister and both of her brothers later developed cancer as well. Late in 2017, after Dr. Kim retired, Scott underwent genetic testing for the first time, which consisted of a blood test showing whether a patient carries a mutation in either of two genes, known as BRCA 1 and BRCA 2. A patient who carries one of these mutations faces a much higher lifetime risk of breast cancer than other women and may choose to have her breasts surgically removed before any cancer develops. Scott's test was positive for a BRCA 2 mutation. Imaging performed soon afterward revealed cancer in her left breast. In March 2018, she underwent surgery to remove both breasts, along with lymph nodes from her left armpit, followed by chemotherapy, radiation, and reconstructive surgery. Her cancer returned in 2022.

¶ 5 Scott brought suit against Dr. Kim and his practice, Bolingbrook Women's Clinic. Her fourth amended complaint, filed April 14, 2023, alleged that Dr. Kim was negligent in three ways: (1) he failed to recognize and quantify her risk of cancer so that he could give her the medical advice and care she needed, (2) he failed to obtain a BRCA test result, and (3) he failed to counsel her about what her family history meant for her own risk of cancer. Her theory was that, had she been told to undergo genetic testing during the thirteen years Dr. Kim treated her,

she would have done so, would have learned she carried the mutation, and would have had her breasts removed before cancer developed.

¶ 6 The defendants denied that Dr. Kim was negligent and denied that anything about his care and treatment caused Scott's cancer. They also raised an affirmative defense of comparative negligence, and, in the alternative, failure to mitigate damages. They claimed that Dr. Kim twice referred Scott for genetic testing—once in 2004 and again in 2013—and that her own failure to follow through on those referrals, and on a breast magnetic resonance imaging (MRI) scheduled in 2012, caused the delay in her diagnosis. The case was tried to a jury over several days in late April 2023.

¶ 7 Scott, a registered nurse, testified that she began having annual mammograms at age 25 because of her family history. When she reached her forties, she sought out a board-certified gynecologist, selecting Dr. Kim from a list her insurer provided. She wanted a physician with advanced training so she would not end up in the same situation as her mother and sister. She first saw Dr. Kim on July 24, 2004. She completed a questionnaire about her family history, and the two discussed it. Dr. Kim told her she was at high risk of developing breast cancer and that they would watch her with yearly mammograms. Scott testified that he never mentioned genetic testing and never gave her a prescription or referral for it. She acknowledged that her own understanding at the time was that the BRCA test was for women already diagnosed with breast cancer before age 60. Had Dr. Kim recommended the test and explained that a positive result could support surgery to prevent cancer, she "absolutely" would have complied.

¶ 8 Scott also testified about a 2012 MRI. She had seen Dr. Hirsch, a physician at an urgent care office, about knee pain, and Dr. Hirsch ordered an MRI of her knee. The imaging office then called to tell her that a breast MRI had also been ordered. Scott had not consulted Dr. Hirsch

about her breasts, and no one at the office could tell her why the separate MRI had been ordered or what it would cost her, so she cancelled it and went forward with the MRI of her knee. She testified that Dr. Kim never discussed a breast MRI with her and that she would have completed the test if he had ordered it.

¶ 9 Scott further testified that when she called for her annual appointment in 2017 and learned Dr. Kim had retired, she saw Dr. Smita Jobanputra, who had purchased his practice. After meeting once with Dr. Jobanputra, she asked her primary care physician, Dr. Seth Osafo, to recommend another gynecologist, and he referred her to Dr. Robin Whatley. Dr. Whatley ordered genetic testing and, after the positive result, ordered imaging, which led to the discovery of cancer in her left breast.

¶ 10 On cross-examination, defense counsel asked Scott about a conversation she had with Dr. Osafo in November 2017 concerning insurance coverage for surgery in patients who test positive for the genetic markers of breast cancer. Scott agreed the conversation occurred. Asked whether Dr. Osafo "said he orders genetic testing," she answered, "He may have, but he didn't do it for me." She added that she had only one discussion with Dr. Osafo, that it took place while she was changing gynecologists, and that she could not speak to why he did not order the test himself. Scott was also treated by Dr. Tayfun Ozgen after she left Dr. Kim's care. Neither Dr. Osafo nor Dr. Ozgen testified at trial, but both were deposed, and both depositions were among the materials reviewed by Dr. Brian Locker, an expert called by the defendants.

¶ 11 Dr. Kim testified twice, first as an adverse witness called by the plaintiff, and again in the defendant's case. He had no independent memory of Scott's care. His testimony rested entirely on his written records, his custom and practice, and his general experience. His chart for July 24, 2004, recorded a normal annual examination, a "strong family history of breast cancer," the word

"mammogram," the notation "genetic screen breast cancer," and the instruction "return back four week."

¶ 12 Dr. Kim testified that in 2004 he wrote orders on a prescription pad and handed them to the patient without keeping a copy, and that the notation on the chart meant he had given Scott such a prescription. He did not recall where he sent her to have the test done, did not know whether the hospitals where he worked employed geneticists, and did not know whether he had ordered a breast MRI in 2012.

¶ 13 He acknowledged that he did not know how likely it was that a woman would carry the mutation when her mother and sister had cancer, and that he did not recall whether he knew at the time how to use the models physicians use to calculate a patient's risk. Apart from the 2004 entry, the only other reference to genetic testing anywhere in his chart was a referral form dated November 6, 2013, addressed to a Maternal-Fetal Medicine Center located on the same floor as his office. His assistant filled out the top of the form, and Dr. Kim wrote "BRCA 1 and 2." The form directed that it be faxed along with the patient's records. Dr. Kim did not know who gave the form to Scott or who in his office would have faxed it.

¶ 14 Gloria Hall, the imaging director at the facility where Scott had her mammograms, testified that her records contained no order from Dr. Kim for a breast MRI, and that Scott cancelled the 2012 MRI after asking about it and learning what it would cost. Kathy Yurkovich, who oversees three offices for the Maternal-Fetal Medicine practice, testified that her office gave Dr. Kim blank referral forms to use, and he referred many patients to them over the years. She had seen the 2013 form in Dr. Kim's chart, but the form never arrived at her office, and she could find no file for Scott anywhere in it.

¶ 15 Dr. Joseph Lucci III, a gynecologist who specializes in cancers of the female reproductive system, testified as the plaintiff's expert. He opined that Dr. Kim deviated from the standard of care by failing to calculate Scott's risk of cancer, failing to counsel her about what her family history meant, and failing to obtain a BRCA test result. Scott's family history alone gave her roughly a 40% lifetime risk of breast cancer, he testified, without any genetic testing at all. A BRCA 2 mutation raises a woman's risk of developing breast cancer by age 80 to about 80%, while surgery to remove both breasts before cancer develops reduces that risk to about 1%. Because the mutation is inherited rather than acquired, Scott would have tested positive at any point in her life. Dr. Lucci testified that Dr. Kim's deviations "significantly delayed interventions that led to ultimately a diagnosis of cancer," and that "[h]ad interventions been undertaken previously, either better screening methods earlier on or preventive surgery, I know all of this could have been avoided."

¶ 16 On cross-examination, defense counsel read to Dr. Lucci a passage from Scott's deposition in which she described Dr. Osafo telling her that insurance companies were now paying for surgery but that genetic testing was required first, and that he told her, "I don't do genetic testing, can you go to an OB/GYN." Dr. Lucci did not specifically recall that testimony. Asked whether Dr. Osafo orders genetic testing, Dr. Lucci said he would have to review the records and the deposition. When he was told that this was Dr. Osafo's deposition testimony, he said he had no reason to disagree.

¶ 17 The defense called Dr. Locker, a board-certified obstetrician and gynecologist, to testify as an expert. Dr. Locker opined that Dr. Kim acted as a reasonably careful physician throughout the thirteen years he treated Scott. Based on the records, Dr. Locker believed Dr. Kim ordered or discussed genetic testing at the 2004 visit and referred Scott for it again in 2013, and that Scott

failed to follow through on both. He acknowledged that no prescription for genetic testing appeared in the chart, explaining that in 2004 a physician would hand such an order to the patient rather than keep a copy. He testified that the standard of care did not require a physician to raise genetic testing at every visit, or to write in the chart that a patient had declined or failed to pursue it, and that patients have the right to decline their physician's advice. Dr. Locker also testified, from his review of Dr. Osafo's deposition, that Dr. Osafo "does order genetic testing," although he had seen nothing indicating that Dr. Osafo ordered it for Scott in October 2013. Dr. Locker's review of the case materials included the depositions of Scott's other treating physicians, among them Dr. Ozgen.

¶ 18 Defense counsel asked Dr. Locker whether he had an opinion as to whether Dr. Kim's assistant had given Scott the 2013 referral form. The plaintiff objected on foundation grounds, arguing that Dr. Locker was "a doctor, not a medical assistant." The circuit court directed counsel to rephrase the question so the foundation could be laid. Dr. Locker then described his own daily experience working with medical assistants and office staff and his understanding of how such referral forms are handled in a physician's office. Counsel asked, "Doctor, do you have an opinion in this case whether or not [Dr. Kim's assistant] gave the referral form to Miss Scott?" Dr. Locker answered, "Yes, I believe she did." Plaintiff's counsel stated, "Same objection, but the answer came out." The court responded, "Thank you," and the examination continued.

¶ 19 On cross-examination, Dr. Locker acknowledged that he had never met Dr. Kim, that his opinions rested on Dr. Kim's records read in the light most favorable to Dr. Kim, that he did not know what Scott had understood, that he could not tell from the 2004 notation where Dr. Kim had directed her to go, and that he never saw an order for a breast MRI anywhere in the records.

Asked whether he agreed that Scott more likely than not could have avoided breast cancer had she undergone genetic testing in 2004 and had her breasts removed, Dr. Locker declined to answer yes or no. He explained that testing in 2004 "would, obviously, have been positive," and that Scott then "would have been given the opportunity to have a mastectomy," but that the surgery "does not completely eliminate the possibility of getting breast cancer." He added that a positive test would not have eliminated the possibility that she would refuse or otherwise fail to proceed with surgery.

¶ 20 At the close of the evidence, the plaintiff moved for a directed verdict on the affirmative defense of comparative negligence, arguing that no witness had testified that her cancellation of the 2012 breast MRI caused anything. Defense counsel responded that Dr. Lucci's testimony supplied the causal link. The trial court denied the motion.

¶ 21 Two matters that arose in closing argument are also at issue on appeal. Before trial, defense counsel, Mr. Thevatheril, disclosed a list of expected witnesses, which included Dr. Jacob Bitran. Dr. Bitran, an oncologist, was listed as an expert witness, and counsel for both sides told the jury in opening statements that it would hear from him. During the trial, the defense decided not to call Dr. Bitran. Scott's counsel raised the matter with the court, and the following colloquy took place (Scott was represented by Ms. Loggans):

> MS. LOGGANS: *** So I made certain comments in opening statement about what Dr. Bitran was going to say, and I had Dr. Bitran under subpoena, because I felt like they might withdraw him; and so I just want to make sure, in the same way that counsel asked me to assure him, that no comments are going to be made that Miss Loggans said that Dr. Bitran's going to say so-and-so, or some piece of evidence

about that, because otherwise—I asked counsel, 'You're definitely calling Bitran,' and he said, 'Yes.' Otherwise, I would have enforced my subpoena.

MR. THEVATHERIL: Miss Loggans is correct, she did ask me that question, whether I will call Dr. Bitran. I did say that I will call Bitran. I will not say in the closing argument that Miss Loggans, in the opening statement, said that Dr. Bitran—their own expert is going to come in and testify about something.

MS. LOGGANS: Because, like I said, she's got 12 to 18 months to live at the time of Dr. Bitran's deposition, for example. So I don't want to hear that she told you something that never came into evidence.

THE COURT: Understood. And you agree that will not happen?

MR. THEVATHERIL: That will not happen.

¶ 22 In closing argument, while addressing Scott's claim that her life expectancy had been shortened, defense counsel said:

> Now, you may hear that other experts could have been called. Well, they could call any experts they want to give a number on it. They could have called any of the experts retained by us. They could have called Dr. Bitran. They chose not to, just like we chose not to.

Plaintiff's counsel objected, and the trial court sustained the objection. Defense counsel then said: "Both sides could have called experts in the case, both sides decided not to call experts. You consider that."

¶ 23 Earlier in the same argument, defense counsel said:

> Then we do know that she has seen Dr. Ozgen. Dr. Ozgen orders genetic testing. He testified under oath he orders genetic testing. He had information about her genetic

> testing, about her background, of her family history. Dr. Osafo, that she began seeing starting 2013 on, he orders genetic testing, he has information about her family history. It's ironic, but their testimony is this whole genetic testing came about because of a discussion with Dr. Osafo. Do you remember Miss Scott's testimony? Ms. Scott testified and said, in 2017, after Dr. Kim is retired, she had a discussion with Dr. Osafo. Dr. Osafo said, insurance companies are now paying for bilateral mastectomies, but you need genetic testing done. But her testimony is, to cover this, that Dr. Osafo somehow does not do genetic testing; you must get it done from another doctor. Dr. Osafo never says, by the way, that. You heard that.

Neither Dr. Osafo nor Dr. Ozgen testified at trial. Scott did not object to these remarks.

¶ 24 The circuit court instructed the jury on Scott's three theories of negligence and on the affirmative defense of comparative negligence. The jury was told that, to sustain a verdict on comparative negligence, Dr. Kim had the burden to prove that Scott "[f]ailed to follow the instruction, advice, and recommendations of her physicians to undergo genetic breast cancer screening; [and] failed to follow the instructions, advice and recommendations of her physicians to timely undergo a breast MRI," and that her negligence was a proximate cause of her injuries. The jury returned a general verdict in favor of the defendants. Neither party submitted a special interrogatory. The circuit court entered judgment on the verdict on May 1, 2023. After two agreed extensions, Scott filed a posttrial motion on August 10, 2023, in which she argued that the court had erred in instructing the jury on comparative negligence and that defense counsel's closing argument was improper. The circuit court denied the motion on January 17, 2024. Scott filed a notice of appeal on January 29, 2024.

¶ 25 II. ANALYSIS

¶ 26 On appeal, Scott argues that (1) the trial court should have entered a directed verdict in her favor on the affirmative defense of comparative negligence, and the court erred by presenting instructions to the jury on comparative negligence, (2) defense counsel made improper remarks during closing argument, and (3) Dr. Locker improperly commented on Dr. Kim's credibility. She contends the final two errors deprived her of a fair trial and mandate a retrial. We address each issue in turn.

¶ 27 A. Comparative Negligence

¶ 28 Scott first argues the trial court erred when it denied her motion for a directed verdict on the affirmative defense of comparative negligence and by later instructing the jury on that defense. She asserts there was insufficient evidence that her conduct proximately caused her injuries and the issue should not have been presented to the jury. She maintains the defendants failed to present expert testimony linking her alleged failures—genetic testing and a timely breast MRI—to proximate cause, so the defense should have been withheld from the jury. The denial of a motion for a directed verdict is reviewed *de novo*, and a directed verdict is proper "only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors [the] movant that no contrary verdict based on that evidence could ever stand." *Evans v. Shannon*, 201 Ill. 2d 424, 427 (2002); *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967). A circuit court's decision to submit a comparative negligence instruction is reviewed for an abuse of the court's discretion. *Hobart v. Shin*, 185 Ill. 2d 283, 294 (1998).

¶ 29 The defendants invoke the general-verdict rule. The general-verdict rule, sometimes called the "two-issue rule," holds that a general verdict for either party "will not be disturbed if the case involved two or more determinative issues, or two or more theories were presented, and

there was sufficient evidence to support at least one of the issues or theories that was free from prejudicial error." *Perez v. St. Alexius Medical Center*, 2022 IL App (1st) 181887, ¶ 64. Nor may a verdict be set aside or reversed on the theory that any ground is insufficient, "unless before the case was submitted to the jury a motion was made to withdraw that ground from the jury on account of insufficient evidence and it appears that the denial of the motion was prejudicial." 735 ILCS 5/2-1201(d) (West 2022). The rule presupposes that a jury will have heard evidence it should not have, and it reflects the legislature's choice to prioritize upholding verdicts "over the prejudice a losing party may have suffered," so long as one ground is legally sound and supported by the evidence. *Perez*, 2022 IL App (1st) 181887, ¶ 71 (quoting *Wright-Young v. Chicago State University*, 2019 IL App (1st) 181073, ¶ 108).

¶ 30 Where multiple claims or defenses are raised, a general verdict "creates a presumption that the jury found in favor of the victorious party on every claim, theory, or defense raised." *Perez*, 2022 IL App (1st) 181887, ¶ 64; *Steed v. Rezin Orthopedics & Sports Medicine, S.C.*, 2021 IL 125150, ¶ 36 (a general verdict for the defense presumes a finding in the defendant's favor on every defense raised, "including the lack of proximate cause"). The burden of clarifying the basis of a general verdict falls on the party who wishes to challenge it, regardless of which party is challenging the verdict. *Krklus v. Stanley*, 359 Ill. App. 3d 471, 479 (2005). Ordinarily, the way to clarify a general verdict is for the nonprevailing party to request a special interrogatory. *Id*.

¶ 31 Scott contends the general-verdict rule does not apply because "there were not two or more determinative issues" in the case. She maintains the sole question was whether Dr. Kim was negligent. We disagree. Breach and proximate cause are separate elements, each of which the plaintiff must prove and each of which the defendants disputed. To prevail, Scott had to

prove that Dr. Kim owed her a duty, that he breached that duty, and that the breach proximately caused her injuries. *Perez*, 2022 IL App (1st) 181887, ¶ 65. A verdict for the defense on either element would have been dispositive. The general-verdict rule reaches distinct, contested elements of a single negligence claim. *Id.* ¶ 69 (rejecting the view that the rule is inapplicable where the jury is told to decide negligence before proximate cause and holding that "the general verdict rule has been applied to proximate causation and affirmative defenses"). It is not confined to cases presenting two or more separate negligence claims, and it applies to every defense raised, including the lack of proximate cause. *Id.*; *Steed*, 2021 IL 125150, ¶ 36.

¶ 32 Breach and proximate cause were both contested at trial. Dr. Locker testified that Dr. Kim met the standard of care at every visit over thirteen years, and the defendants argued that nothing about Dr. Kim's care caused Scott's cancer. The jury's general verdict is therefore consistent with a finding that Scott failed to carry her burden on either breach or proximate cause, regardless of the affirmative defense.

¶ 33 In other words, the trial was held on multiple contested issues and, absent a special interrogatory, we are unable to determine whether the jury even reached the affirmative defense. As was the case in *Krklus*, the verdict "is silent as to the jury's reasons for finding in favor of [the] defendant[s]," and nothing in the record suggests the jury believed Scott had proved her case in the first place. See *Krklus*, 359 Ill. App. 3d at 479.

¶ 34 Scott's challenge to the denial of her motion for a directed verdict fails on the merits as well. Because Scott was the movant and the defendants bore the burden of establishing comparative negligence, a directed verdict would have been warranted only if the evidence so overwhelmingly negated the defense that no reasonable jury could find Scott comparatively at fault. See *Evans*, 201 Ill. 2d at 427. The record does not meet that demanding standard. The

defendants presented evidence that Dr. Kim twice referred Scott for genetic breast-cancer screening, once in 2004 and again in 2013, and that she did not complete the testing either time. This conduct was contemporaneous with her treatment by Dr. Kim. Scott denied the defendants' claims, but the conflict was properly an issue for the jury to resolve. The circuit court was correct to deny the motion for a directed verdict. Thus, the requirement under section 2-1201(d) that a party must both move for the withdrawal of an insufficient theory *and for the denial of that motion to be prejudicial* is unmet. 735 ILCS 5/2-1201(d) (West 2022).

¶ 35 We reach this holding despite Scott's argument that the defendants were required to establish, through expert testimony to a reasonable degree of medical certainty, that her own failure to pursue testing proximately caused her injury, and that no such testimony was offered. On review, the controlling determination is whether the evidence, viewed in the light most favorable to the defendants, so overwhelmingly favored Scott that no contrary verdict could ever stand. *Evans*, 201 Ill. 2d at 427. It did not. It is immaterial that the causation evidence the defendants invoked came from Scott's own expert. In reviewing the denial of a directed verdict, we consider all of the evidence in the record, whatever its source. *Id.*

¶ 36 Assuming, *arguendo*, the jury reached the affirmative defense, the circuit court did not err in submitting a comparative negligence instruction. The court has broad discretion to determine which issues the evidence raises and to instruct the jury accordingly. *Hobart*, 185 Ill. 2d at 294-95. A comparative negligence instruction is proper where there is evidence that the patient's negligence preceded or was contemporaneous with malpractice. *Krklus*, 359 Ill. App. 3d at 480. Here, as noted above, the defendants presented evidence that Dr. Kim twice referred Scott for genetic breast-cancer screening, once in 2004 and again in 2013. The defense offered evidence that Scott did not complete either genetic test. That conduct was contemporaneous with

the thirteen-year course of treatment Scott alleges was negligent. Accordingly, the trial court did not abuse its discretion when it instructed the jury on the issue of comparative negligence.

¶ 37 B. Closing Arguments

¶ 38 Scott raises two concerns with defense counsel's closing argument. First, she contends that defense counsel broke an agreement not to mention Dr. Bitran by discussing his absence in his closing argument. Second, Scott argues that counsel improperly referenced Dr. Osafo's and Dr. Ozgen's discovery depositions.

¶ 39 Overseeing closing arguments is a matter of the trial court's discretion, and its judgment will not be disturbed absent a clear abuse of that discretion. *Magna Trust Co. v. Illinois Central R.R. Co.*, 313 Ill. App. 3d 375, 396 (2000). Attorneys are afforded wide latitude to comment on the evidence and on the inferences fairly drawn from the evidence. *Zickuhr v. Ericsson, Inc.*, 2011 IL App (1st) 103430, ¶ 72. Improper remarks warrant a new trial only where such a remark causes substantial prejudice. *Id.* ¶ 75. In other words, an improper remark warrants a new trial only where the results of the trial would have been different without it. *Id.*; *Davis v. City of Chicago*, 2014 IL App (1st) 122427, ¶ 84. Ordinarily, sustaining an objection is enough to cure any prejudice. *Magna Trust*, 313 Ill. App. 3d at 396.

¶ 40 Scott argues that defense counsel broke his word not to discuss "plaintiff's failure to call Dr. Bitran." However, the record reflects a narrower agreement. Scott's counsel was concerned that defense counsel would use Scott's failure to call Dr. Bitran to the stand to suggest that Scott's counsel had broken the implicit promise she made during opening statements to provide testimony from Dr. Bitran. She stated, "I made certain comments in opening statement about what Dr. Bitran was going to say *** so I just want to make sure *** that no comments are going to be made that [plaintiff's counsel] said that Dr. Bitran's going to say so-and-so." Her

concern was the discrepancy between what she told the jury to expect in her opening statement and the evidence that was eventually produced at trial, and she confirmed it a second time when she said, "I don't want to hear that she told you something that never came into evidence."

¶ 41 Defense counsel agreed not to raise the discrepancy to the jury, and he did not. Scott does not identify any portion of defense counsel's closing argument in which he refers to Scott's opening statement or any promised testimony that did not materialize. Instead, he stated that either side could have called additional experts and neither side did.

¶ 42 Even assuming the remark was improper, it does not warrant a new trial. The remark was made in the course of a lengthy closing argument, and the circuit court sustained an objection at the mention of Dr. Bitran. See *Magna Trust*, 313 Ill. App. 3d at 396 (sustaining an objection is ordinarily enough to cure any prejudice resulting from an improper remark during closing argument). Defense counsel did not repeat the point about Dr. Bitran and instead moved on to the more general comment about both sides not calling additional experts. Taken in context, the remark does not warrant a new trial. See *Davis*, 2014 IL App (1st) 122427, ¶ 84 (a new trial is unwarranted unless, viewing the trial in its entirety, the argument caused substantial prejudice or prevented a fair trial); *Lauman v. Vandalia Bus Lines, Inc.*, 288 Ill. App. 3d 1063, 1071 (1997).

¶ 43 Next, Scott argues that because neither Dr. Osafo nor Dr. Ozgen testified at trial, counsel's references to what they said in their discovery depositions had no evidentiary foundation. She contends that the defendants violated Illinois Supreme Court Rule 212(a) (eff. Oct. 1, 2020) by referencing discovery depositions as substantive evidence during closing argument, and counsel should have been precluded from referencing the substance of those depositions. Rule 212(a) generally bars the use of discovery depositions as evidence at trial except in certain circumstances that are not applicable here. *Browning v. Advocate Health &*

Hospital Corp., 2023 IL App (1st) 221430, ¶ 52. Scott admits that she did not object to these remarks at the time they were made, and she raised the issue for the first time in her posttrial motion.

¶ 44 A contemporaneous objection is required to preserve a claim of improper argument, and the failure to object forfeits the claim. *Eid v. Loyola University Medical Center*, 2017 IL App (1st) 143967, ¶ 62; *Auten v. Franklin*, 404 Ill. App. 3d 1130, 1154 (2010). The rule exists because a timely objection gives the court the opportunity to strike the remark or instruct the jury to disregard it, remedies that are unavailable once the jury has retired. *Vanderhoof v. Berk*, 2015 IL App (1st) 132927, ¶ 94.

¶ 45 Scott acknowledges that she has forfeited review of the issue but asks us to review it anyway, noting that forfeiture is a limitation on the parties and not on a reviewing court. *In re Estate of Chaney*, 2013 IL App (3d) 120565, ¶ 9. She cites *City of Quincy v. V.E. Best Plumbing & Heating Supply Co.*, 17 Ill. 2d 570, 577 (1959), which permits review of improper arguments where the prejudice is such that the parties cannot receive a fair trial and "the judicial process cannot stand without deterioration." *Id.* Nothing in defense counsel's remarks approaches the high bar set in *City of Quincy*.

¶ 46 Additionally, we reject Scott's accusation that defense counsel "made up evidence." She contends that because neither Dr. Osafo nor Dr. Ozgen testified at trial, counsel's references to what they said under oath had no evidentiary basis. However, Dr. Osafo's statements were referenced by three witnesses without objection. During the cross-examination of Dr. Lucci, defense counsel read aloud a passage of Scott's deposition in which she recounted Dr. Osafo saying, "I don't do genetic testing, can you go to an OB/GYN." Dr. Lucci was then asked whether Dr. Osafo orders genetic testing, and he responded that he had no reason to disagree that

Dr. Osafo had made that statement. Dr. Locker, who had reviewed Dr. Osafo's deposition, was asked whether Dr. Osafo testified that he orders genetic testing, and he responded by saying, "He does order genetic testing." Scott herself was also asked on cross-examination whether she knew that Dr. Osafo "said he orders genetic testing," and she responded, "He may have, but he didn't do it for me."

¶ 47 Defense counsel's closing argument tracked the evidence offered at trial. He argued that Dr. Osafo orders genetic testing as a matter of practice, that Scott's account was that Dr. Osafo "somehow does not do genetic testing," and that the evidence did not support her account. An attorney is permitted to comment on the evidence and on the facts an expert relies upon in forming an opinion. *Zickuhr*, 2011 IL App (1st) 103430, ¶ 72; *Wilson v. Clark*, 84 Ill. 2d 186, 196 (1981). Counsel's description of Dr. Osafo's discovery deposition as testimony given "under oath," however, violated Rule 212(a). Ill. S. Ct. R. 212(a) (eff. Oct. 1, 2020). While it was an improper characterization, the dispositive question is not whether counsel violated Rule 212(a) but whether the violation deprived Scott of a fair trial. See *Walsh v. Sklar*, 2025 IL App (1st) 231830, ¶ 60.

¶ 48 Dr. Ozgen's deposition testimony stands on a different footing from that of Dr. Osafo. Dr. Osafo's practice of ordering genetic testing was placed before the jury through the cross-examination of Dr. Lucci and the testimony of Dr. Locker, each of whom had reviewed Dr. Osafo's deposition. The record contains no comparable foundation for the single reference to Dr. Ozgen, who did not testify and whose deposition was scarcely mentioned at trial except as a document reviewed by Dr. Locker. Counsel's statement that Dr. Ozgen "orders genetic testing" and "testified under oath" was therefore unsupported by the evidence and, like the reference to Dr. Osafo, ran afoul of Rule 212(a). Ill. S. Ct. R. 212(a) (eff. Oct. 1, 2020).

¶ 49 Even so, the remark does not warrant a new trial. Scott did not object when it was made, forfeiting the claim, and the remark does not satisfy the narrow standard that would permit review notwithstanding that forfeiture. *City of Quincy*, 17 Ill. 2d at 577. It is Scott's burden to show how the remark caused substantial prejudice and affected the outcome of the trial, and she has not met it. See *Browning*, 2023 IL App (1st) 221430, ¶ 64 (erroneously reading a nonparty treating physician's discovery deposition to the jury did not warrant a new trial); see also *Walsh*, 2025 IL App (1st) 231830, ¶¶ 60-62 (declining to relax forfeiture of unobjected-to references in opening statement and closing argument where the remarks did not deny the party a fair trial). The remark went to an ancillary matter. Whether Scott's other physicians order genetic testing as a general practice says nothing about her own care, and Scott testified that none of them ordered testing for her. The jury heard her testimony and was free to weigh it.

¶ 50 A single, passing reference to a nontestifying physician on the collateral question of whether Scott's physicians generally order genetic testing does not approach the standard described in *City of Quincy*, particularly where, as explained above, the jury returned a general verdict that may have rested entirely on its rejection of Scott's *prima facie* case. *Davis*, 2014 IL App (1st) 122427, ¶ 84.

¶ 51 C. Dr. Locker's Comments

¶ 52 Scott's final contention is that Dr. Locker improperly testified to Dr. Kim's credibility. She concedes that she objected to some but not all of the testimony she now challenges, and that she did not raise the issue in her posttrial motion. As noted above, both omissions are significant. See *Brown v. Decatur Memorial Hospital*, 83 Ill. 2d 344, 349 (1980) (a contemporaneous objection permits the court to consider improper testimony and exclude it, and a posttrial motion

allows the court to consider the question and grant relief without the expense of an appeal). Scott requests that we consider the issue under the plain-error doctrine.

¶ 53 Application of the plain-error doctrine in civil cases is "exceedingly rare" and is reserved for error "so egregious that it deprived the complaining party of a fair trial and substantially impaired the integrity of the judicial process itself." *Wilbourn v. Cavalenes*, 398 Ill. App. 3d 837, 856 (2010). Our review of the record reveals that no error occurred. Dr. Locker was not asked whether he believed Dr. Kim, and he did not say that he did. The question Scott points to concerned Dr. Kim's assistant. Dr. Locker was asked, "Doctor, do you have an opinion in this case whether or not [Dr. Kim's assistant] gave the referral form to Miss Scott?" Dr. Locker's response was drawn from the referral form in the chart, the practice of the Maternal-Fetal Medicine Center, and his own experience with how medical assistants handle forms in an office setting. His testimony was based on his own review of the records and his knowledge of office procedure and did not usurp the jury's function of deciding credibility.

¶ 54 The context of the question confirms our reading of the record. After the question was asked, Scott's counsel objected to foundation, complaining that Dr. Locker was "a doctor, not a medical assistant." The court responded by directing defense counsel to rephrase the question so foundation could be laid. When Dr. Locker answered, Scott's counsel said, "Same objection, but the answer came out," and did not move to strike the answer. Scott's counsel later cross-examined Dr. Locker on the limits of what he knew, establishing that he had never met Dr. Kim, did not know what Scott understood or did not understand, and could not say where Dr. Kim had directed her to go.

¶ 55 Scott asks us to consider this claimed error cumulatively with the other errors she alleges. However, where no individual claim amounts to reversible error, there is generally no

cumulative error. *Mueller v. Phar-Mor, Inc.*, 336 Ill. App. 3d 659, 670 (2000). We have found no error in the submission of the affirmative defense, no substantial prejudice excusing Scott's forfeiture of any improprieties during closing argument, and no error in Dr. Locker's testimony. Accordingly, there is no cumulative error. See *Id.*

¶ 56 III. CONCLUSION

¶ 57 For the foregoing reasons, we affirm the judgment of the circuit court of Will County.

¶ 58 Affirmed.