2015 IL App (1st) 123771-U

SECOND DIVISION
December 22, 2015

No. 1-12-3771

GEORGIE ANNE GEYER, Plaintiff-Appellant, v. JEFFREY TAUGNER, D.D.S., P.C., JEFFREY TAUGNER, D.D.S, MARYANN V. KELLY a/k/a TAUGNEY, D.D.S., DANIEL I. CHIN, JR., D.D.S & ASSOC., P.C. and DANIEL I. CHIN, JR., D.D.S, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County No. 09 L 7875 Honorable William J. Haddad, Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justice Simon and Justice Liu concurred in the judgment.

ORDER

¶ 1 Plaintiff, Georgie Anne Geyer, brought a medical malpractice action against defendants, dentists Jeffrey Taugner and Maryann Kelly, and oral surgeon Daniel Chin, for negligent failure to diagnose and biopsy a cancerous tongue lesion and negligent failure to inform her of her condition, resulting in the removal of more than two-thirds of her tongue, and a neck dissection to determine lymph node metastasis followed by radiation therapy. A jury found in favor of defendants. Plaintiff's posttrial motion for a new trial was denied. Plaintiff appeals, arguing the

trial court erred in denying her posttrial motion because: (1) the verdict was against the manifest weight of the evidence; or, alternatively, (2) she was unfairly prejudiced by improper evidence presented to the jury and by statements made by defendants' counsel in *voir dire* and closing arguments. We find the cumulative effect of the improper defense evidence so prejudiced plaintiff that she was denied a fair trial. We remand this cause for a new trial.

¶ 2 BACKGROUND

¶ 3 In 2007, plaintiff was diagnosed with squamous cell carcinoma of the tongue involving four lymph nodes, a stage IV cancer. Plaintiff underwent extensive treatment and surgery resulting in the removal of two-thirds of her tongue, a neck dissection to identify any lymph node metastasis and radiation therapy. As a result of the surgery and treatment, she experienced constant pain in her mouth, she cannot eat properly, she has frequent drooling and does not speak clearly, and she suffered burns on her face, neck and back from the radiation therapy causing permanent injury to her esophagus. Plaintiff contends the negligent failure to properly diagnose the lesion as tongue cancer and the failure to promptly biopsy the lesion delayed treatment for over a year, allowing the cancer to grow, causing the injuries suffered as a result of late-stage cancer treatment.

¶ 4 Plaintiff was a patient of Dr. Taugner's since 1985. Although she has lived outside of Illinois for some time, she routinely returned to Chicago three or four times a year for regular dental appointments with Dr. Taugner. From May, 2006 through diagnosis of her tongue cancer in late 2007, plaintiff visited Taugner numerous times, Dr. Kelly once and was referred to Dr. Chin for a biopsy after Taugner had observed on each visit a lesion located on the left side of her tongue. Chin took a biopsy of her cheek, not the tongue, and reported it was benign. In late 2007,

plaintiff was diagnosed with tongue cancer.

¶ 5 Plaintiff alleged that defendants' negligence proximately caused a delay in her cancer diagnosis and treatment requiring her to suffer a more invasive, disabling and painful treatment. Specifically, defendants Taugner and Kelly acted negligently by failing to: (1) include tongue cancer in their differential diagnosis; (2) properly refer her for a tongue biopsy; and (3) adequately provide plaintiff with informed consent of her condition. Plaintiff alleged that Taugner referred her to Chin for a biopsy of the tongue, however, Chin did not perform a biopsy of the tongue, and he instead took a biopsy of the cheek. The negligence claim against Chin alleged failures to: (1) include oral cancer in his differential diagnosis; (2) biopsy plaintiff's tongue; (3) diagnose oral cancer of her tongue; (4) refer plaintiff for tongue cancer treatment; and (5) consult in a timely fashion with Taugner.

¶ 6 Relevant to this appeal, Chin filed an affirmative defense alleging that plaintiff was at least 50% responsible for the outcome of her medical condition in that she failed to follow Chin's treatment recommendations and return for follow up appointments. The trial court later found that Chin had no evidentiary support for this affirmative defense and barred him from asserting it at trial.

¶ 7 The parties disclosed their Rule 213(f)(1) (eff. July 1, 2002) fact witnesses and Rule 213(f)(3) (eff. Jan. 1, 2007) expert witnesses. In addition to the retained expert witnesses, Chin also disclosed 10 non-defendant doctors from Washington, D.C. that treated plaintiff between 2006 and 2007 as independent expert witnesses. These doctors included plaintiff's allergist, internists, otolaryngologist/reconstructive surgeon, gastroenterologist, and a dentist she visited once on April 6, 2007. These non-defendant doctors were expected to testify consistent with their

discovery depositions and their treatment records of plaintiff.

¶ 8 *Pretrial In Limine Motions*

¶ 9 Plaintiff filed three motions *in limine* which are pertinent to this appeal. Plaintiff's motion *in limine* No. 39 sought to bar any reference to a dozen preexisting medical conditions (hysterectomy, back injuries, upper respiratory infections, high cholesterol, enlarged lymph node in her groin, ulcer on her tongue in 2003, heart concerns, hepatitis, stomach ulcers) and any suggestion that she has a diminished life expectancy as a result. Plaintiff argued that these conditions were not at issue, not related to her tongue cancer and are irrelevant. Defendants argued that certain medications plaintiff was taking for some of her preexisting conditions can cause mouth lesions and fungal infections and these conditions and medications are relevant to show that defendants reasonably considered the circumstances in treating her and the fungal infections of the mouth diagnosed by defendants. The trial court denied the motion as to her use of various medications and the 2003 ulcer on her tongue. The trial court granted the motion as to her high cholesterol, enlarged lymph node in the groin, hepatitis, other medical history unrelated to the tongue and diminished life expectancy.

¶ 10 The trial court granted plaintiff's motion *in limine* No. 40 to bar reference to plaintiff's comparative or contributory negligence and failure to mitigate damages.

¶ 11 Motion *in limine* No. 41 sought to bar any reference to the non-defendant Washington, D.C. treating doctors' failure to observe or document tongue lesions and failure to perform or refer plaintiff for a biopsy. Plaintiff argued that whether any other doctor observed a tongue lesion or performed a tongue biopsy was irrelevant as to whether the defendants failed to comply with the standard of care where the defendants documented the presence of the lesion at every

appointment, yet failed to order a biopsy of the tongue and make an earlier diagnosis of the cancer. Plaintiff also argued that these non-defendant doctors did not have the same licenses and/or specialties as the defendants; the purposes for the visits were different; and their related duties owed to plaintiff were not the same as the duties defendants owed to plaintiff. Geyer further argued that any probative value of this evidence would be substantially outweighed by the danger of misleading the jury and cause jury confusion resulting in unfair prejudice to plaintiff. Geyer argued that the defendants would improperly use this evidence and sought to preclude this testimony on the basis that defendants' counsel would argue that the findings of the non-defendant doctors was proof that the defendants did not deviate from the standard of care and/or that the lesion on the left border of plaintiff's tongue, as noted by defendants at their exams, was not sufficient evidence of medical negligence.

¶ 12 Defendants argued that the deposition testimony was relevant because "other doctors looked at her mouth and didn't see anything that was cancerous or suspicious or warranted a biopsy *** it's been part of our defense [ ] that there was no cancer." The trial court inquired: "[a]nd you're claiming that these other doctors who looked at her at the time had an opportunity to see the very same thing the defendants did and failed to denote that as evidence of a cancerous lesion?" Defendants' counsel responded, "[o]r didn't see anything or saw something that the defendants diagnosed which would be lichen planus or thrush." The court responded "[a]nd they're permitted to do that *** they wouldn't be here if this wasn't their defense, so gotta give them their day in court." The trial court denied the motion in part and permitted defendants to use the non-defendant doctors' testimony to support their theory that plaintiff did not have cancer until August 2007.

¶ 13 *Trial Testimony*

¶ 14 At trial, plaintiff testified that she visited Dr. Taugner for a routine dental exam on May 15, 2006. At that exam, Dr. Taugner testified he informed her that there was a red lesion on the left lateral border of her tongue that might have been caused by the prophy-jet used to clean her teeth. Geyer could not see the lesion. Dr. Taugner testified he made a notation to "watch left lateral border of tongue. Red area. Informed patient." He had never observed a lesion in plaintiff's mouth before. The lesion could not be wiped off but was not likely cancer. The red area was not present at the beginning of the hygiene appointment and only appeared after using the prophy-jet. He used a hand mirror to show Geyer the irritated part of the tongue which was "readily visible right in front." He scheduled a hygiene visit in three months and instructed her to call him if the redness did not go away.

¶ 15 Plaintiff returned for another routine exam with Dr. Taugner on August 30, 2006. During the exam, Dr. Taugner again noted a white lesion on the left side of her tongue and referred her to Dr. Chin for a biopsy. Dr. Taugner's records reflect he observed a "white lesion left lateral border of the tongue that is painful." This white lesion was found in the same area as the red lesion observed in May 2006, near the front of the tongue. The lesion could not be completely scraped away and cancer was not in his differential diagnosis. He thought the white lesion might have been caused by plaintiff's use of an asthma inhaler. Dr. Taugner did not observe any abnormal condition of her cheek. He referred plaintiff to Dr. Chin to evaluate the tongue. Dr. Taugner testified that if he thought the lesion had been cancerous, he would have referred her for a biopsy of the tongue and ensured that a biopsy was performed.

¶ 16 On September 15, 2006, plaintiff was seen by Dr. Chin, who testified that he observed a

lesion on the left lateral border of plaintiff's tongue that extended from the side of the tongue to the inside of the left cheek. White thick mucus was on the top and sides of the tongue as well as both sides of the cheek. The cheek had red and white striations whereas the tongue lesion was only white. Based on his examination, Chin considered the cheek more virulent than the tongue and thought plaintiff had mouth fungus. Tongue cancer was included in his differential diagnosis. Dr. Chin specifically reported the presence of the lesion to plaintiff and explained that the cheek presented a more virulent area and was more representative of the abnormality. Chin informed plaintiff that the cheek biopsy would hurt less than the tongue biopsy and Geyer chose the cheek biopsy. Plaintiff testified Dr. Chin elected to perform a cheek biopsy instead of a tongue biopsy because tongue biopsies were painful.

¶ 17 Plaintiff testified that two weeks after the biopsy, Dr. Chin told her that she had lichen planus on her cheek and that the biopsy was benign. Dr. Chin testified that he called plaintiff to report the negative biopsy result. At this point, Dr. Chin had not ruled out cancer in his differential diagnosis. Plaintiff was to return if she had further problems. Chin called Dr. Taugner to explain the biopsy results and to have plaintiff return as necessary. Dr. Taugner testified that he received a pathology report from Dr. Chin explaining the results of the cheek biopsy. Dr. Taugner knew the tongue had not been biopsied and assumed the tongue lesion had disappeared.

¶ 18 In December 2006, plaintiff went to Dr. Taugner's office for another routine dental exam. Plaintiff testified that Dr. Taugner was not available, so his wife Dr. Kelly, a dentist in the office, performed her dental exam. Dr. Kelly informed plaintiff of a lesion in her mouth. Plaintiff could not see the lesion by herself. Dr. Kelly also diagnosed plaintiff with benign lichen planus.

¶ 19 Dr. Kelly testified that during the 15-month time period at issue, she treated plaintiff only once on December 14, 2006. She performed a routine dental exam of plaintiff at a hygiene appointment because Dr. Taugner was not in the office. She reviewed Dr. Taugner's notes from plaintiff's previous dental exams. She was aware of Dr. Taugner's directive to "watch left lateral border of tongue, red area on patient"; that a white lesion was present on the left lateral border of plaintiff's tongue on August 30, 2006; and that Dr. Chin had performed a cheek biopsy. Dr. Kelly observed the condition of plaintiff's mouth at the December 2006 appointment and noted "left lateral border, back of tongue, white, irritated, and tender as well as floor of mouth red area." Plaintiff did not complain of mouth pain until Dr. Kelly palpated the tongue and floor of the mouth. Kelly testified she told plaintiff that the mouth condition indicated "textbook" lichen planus and directed her to call in two weeks if it was still present. Dr. Kelly had no doubt that plaintiff had lichen planus. She did not consider it to be oral cancer and did not tell plaintiff that the signs of oral cancer can be red and white patches in the mouth, because the patches appeared in a "new area."

¶ 20 On cross-examination, Dr. Kelly testified that plaintiff was on three medications for lichen planus. Dr. Kelly rolled plaintiff's tongue to the side to show her the white area in the mirror. Dr. Kelly knew the mouth condition was in a "new area" because plaintiff told her that the lesion present in August "was much further forward."

¶ 21 In March 2007, plaintiff testified that she phoned Dr. Taugner to report a continuing problem with her mouth. Dr. Taugner suggested she see someone in Washington, D.C. to determine if anything had changed in her mouth condition. Dr. Taugner testified plaintiff called complaining that her mouth was sore and her throat was hoarse. Because the complaints involved

new concerns, he recommended she return to Chicago to see him and, if unable, then to see an oral surgeon in Washington, D.C. in the interim.

¶ 22 On April 6, 2007, plaintiff was seen by Washington, D.C. dentist, Dr. Jeffrey Gitelman. Plaintiff testified that she told Dr. Gitelman about her biopsy in late 2006 and that she had lichen planus. Plaintiff also testified that Dr. Gitelman refused to look in her mouth during the appointment. According to plaintiff, Dr. Gitelman told her she should go back to her dentists in Chicago because there was nothing he could do for her.

¶ 23 On April 30, 2007, Geyer testified she was again seen by Dr. Chin who examined her mouth and prescribed her a topical cream for her mouth condition. Dr. Chin testified that he observed a raw denuded lesion on the left lateral border of the tongue that was "ominous" but not painful or tender and did not include an ulcer. The lesion presented in the same area as the lesion noted in September 2006. Based on his examination, he diagnosed plaintiff with thrush, a benign fungal condition, and prescribed a steroid cream for treatment for any pain. Dr. Chin testified that he did not tell plaintiff that she might have oral cancer. He testified that he was "hoping" plaintiff did not have cancer.

¶ 24 Plaintiff testified that the same day, she went to Dr. Taugner's office for an appointment, but he was not available. Dr. Taugner testified that he was running late for plaintiff's appointment and she chose not to wait her turn. According to Dr. Taugner, plaintiff mentioned that she would follow up with Dr. Chin.

¶ 25 Plaintiff then returned to Washington, D.C. and continued using the topical cream. Dr. Chin testified that he refilled her prescription in May 2007, after plaintiff complained of continuing pain.

¶ 26 At the end of July 2007, plaintiff noticed a dime-sized white growth on the left side of her tongue. Plaintiff called Dr. Taugner who recommended she see an ear, nose and throat doctor.

¶ 27 Plaintiff saw an ear, nose and throat doctor in Washington, D.C., Dr. Scott McNamara, who performed a scope of her throat and diagnosed her with a benign condition, thrush, and prescribed an oral rinse medication.

¶ 28 On August 27, 2007, plaintiff returned to Dr. Chin's office. Plaintiff testified she was concerned by the growth of the lesion and that Dr. Chin diagnosed her with thrush. Dr. Chin testified he examined plaintiff on August 27, 2007 and observed a "more ominous lesion" on the left lateral border of the tongue. The fungal overgrowth was more adherent than it had been prior and he could not see the tongue underneath. He diagnosed plaintiff with a fungal infection and scheduled her to return to follow up on August 31. Dr. Taugner testified that he also examined plaintiff on August 27, 2007 and noted that plaintiff's tongue had an ulcer which encompassed the entire left lateral border. This area included the red lesion he noted in May 2006 and the white lesion he observed in August 2006. He thought it might be thrush and attempted to remove it. Instead, he saw a raw denuded area. This was his last appointment with plaintiff.

¶ 29 Dr. Chin testified that he examined plaintiff again on August 31, 2007 and thought the thrush was improving. However, based on his evaluation he diagnosed her with "thrush with potential cancer underlying" and recommended a biopsy of her tongue.

¶ 30 On September 23, 2007, plaintiff saw her internist (Klein) to evaluate her tongue. Her internist reported that she did not have thrush or lichen planus. Dr. Klein referred plaintiff to an oral surgeon for an exam and biopsy.

¶ 31 Thereafter, plaintiff was examined by Washington, D.C. oral surgeon, Dr. Mopsik. He

performed a biopsy and informed her that she had tongue cancer. Plaintiff was seen by an ear, nose and throat doctor, Dr. Catherine Picken, who explained the treatment and surgery. The tongue cancer surgery was performed by Dr. Joseph Califano.

¶ 32 *Expert Trial Testimony*

¶ 33 Plaintiff called three experts to opine that plaintiff had a cancerous lesion in May 2006 which continued to grow and develop into the stage III cancer later diagnosed in late 2007.

¶ 34 Plaintiff's expert, Dr. Michael Krell, a board-certified oral surgeon, opined that Dr. Chin was professionally negligent in failing to perform a biopsy of plaintiff's tongue, diagnosing the lesion on plaintiff's tongue through a biopsy and diagnosing cancer of her tongue. Squamous cell carcinoma cannot be diagnosed by looking at or feeling a tongue lesion. To definitively diagnose squamous cell carcinoma, a tissue biopsy must be performed. A lesion which appears at one time and moves or looks different is suspicious in nature and these changes can indicate the presence of tongue cancer. Dr. Krell testified that the lesion present in May 2006 was cancer. The lesion, as recorded in later exams by Taugner, Kelly and Chin, was present for 15 months and was suspicious for cancer. According to the cheek biopsy, plaintiff did not have lichen planus or thrush, but only had "lichenoid features or [a] lichenoid reaction." The mouth conditions described by Chin in his records were actually cancer. The tongue has a greater propensity for cancer than the cheek and based on plaintiff's history of the lesion being present from May 2006 it was unreasonable for Chin to only biopsy the cheek in September 2006. If Chin had performed a tongue biopsy in September 2006 or April 2007, a cancer diagnosis would have been made. In addition, at the April 2007 visit, when Chin noted a "[r]aw denuded" area in the same place as the September 2006 lesion and swollen lymph nodes underneath that area, the standard of care

required Chin to take a biopsy and inform plaintiff that the lesion might be cancer and must be removed. On cross-examination, Dr. Krell testified that lichen planus is largely present on the cheek; it can wax and wane and at times it will appear and then later disappear. Dr. Chin's counsel then focused the questioning on Krell's opinion of Dr. Gitelman's treatment and records including: what plaintiff may or may not have told Gitelman; Gitelman's examination of her on April 6, 2007 and Gitelman's findings and failure to perform a biopsy.

¶ 35 Plaintiff's expert, Dr. Wayne Koch, an ear, nose and throat doctor, opined that plaintiff had a progressive cancer burrowing into her tongue over the course of 15 months. In his opinion, plaintiff had stage I cancer from May to December 2006. Her cancer became a stage II cancer by April 2007 and worsened thereafter until it became a stage III cancer in October 2007. He further opined that had her cancer been diagnosed while at stage I or II, the treatment would have required the removal of the tumor only with a small margin of tissue surrounding it. Stage I and II cancer of the tongue generally do not involve the lymph nodes. The cancer progressed, spreading to her lymph nodes by August 2007. Most squamous cell carcinomas have an "intermediate" growth rate and very few grow rapidly over the course of weeks. In his opinion, the steroid inhalers taken by plaintiff for her asthma do not cause a "single lesion on the side of the tongue" but rather a sore throat or a yeast infection occurring throughout the throat. Based on the cheek biopsy, plaintiff did not have lichen planus prior to the cancer treatment and descriptions of her mouth found in her medical records are not consistent with the presence of lichen planus. He reviewed a March 2007 CT scan of plaintiff's sinuses which captured an image of her tongue. Dr. Koch testified that this is not the proper test to perform to look for signs of tongue cancer and her tumor would not be visible on the scan. At times, he has seen tongue

cancer take several years to develop. The growth of plaintiff's tongue cancer over a year and a half was progressive, in the intermediate range. On cross-examination, Dr. Koch testified that the lichenoid features present in plaintiff's mouth identified in the August 2006 cheek biopsy could have been caused by some of the medications plaintiff had been taking for other ailments. Any cancer burrowing into her tongue from August 2006 would cause persistent pain, although fluctuating over time. Geyer's complaints of mouth pain were indicative of the tumor burrowing into the tongue and affecting its nerves. Dr. Taugner's counsel asked Dr. Koch "[b]ut the records do not reflect that Ms. Geyer was making reports of persistent and increasing pain in her mouth to her treaters in Washington, D.C., from September 2006 through April of 2007; isn't that correct?" Dr. Koch answered, "[t]he records don't demonstrate that she compared it from one time to another in any one of those records. That's right." The cross examination continued with extensive and detailed questioning of Koch about Dr. McNamara's and Dr. Klein's examinations of plaintiff in the summer of 2007 and what Dr. Koch thought Drs. McNamara and Klein might have seen in plaintiff's mouth at that time.

¶ 36 Lastly, plaintiff's expert, Dr. Nelson Lee Rhodus, a board-certified dentist, testified that a lesion presenting in the same place at several visits which changes in color or shape is suspicious and might indicate cancer. In his opinion, when a dentist first observes a lesion the standard of care requires the dentist to see the patient two weeks later to observe any changes. Minor trauma, like from a prophy-jet, should disappear within two weeks. If the lesion is still present, cancer should be a concern and the lesion must be biopsied. Any recurrent lesions must also be biopsied. He opined that the standard of care required Dr. Taugner to reevaluate plaintiff two weeks after her May 2006 appointment when he observed the red lesion. A lesion may not

exhibit symptoms and a patient does not have the training to determine whether the lesion is still problematic. The failure of Dr. Taugner to make a proper biopsy referral and include cancer in his differential diagnoses at each subsequent appointment violated the standard of care. Similarly, he opined Dr. Kelly violated the standard of care when she observed the lesion in December 2006 and did not refer plaintiff for a biopsy or include cancer in her differential diagnosis. Again, on cross-examination there was detailed questioning regarding the non-defendant Washington, D.C. doctors and what they did and did not see in relation to Rhodus's opinion that the cancerous lesion was present in 2006-2007 during the time of the defendants' treatment of plaintiff.

¶ 37 Defendant Chin's expert witness, Dr. G.E. Ghali, a dentist, testified that plaintiff's complaint of "recurrent ulcers and pain" to Dr. Chin at the September 2006 appointment was significant because cancer is a continuous condition, it does not go away and return. Whereas, lichen planus is a condition with no cure and it comes and goes. He opined that Dr. Chin met the standard of care in performing a biopsy of the cheek because it was consistent with plaintiff's presentment of symptoms, lack of pain and reported concerns. The standard of care does not require multiple biopsies of a homogenous lesion. He further opined that Dr. Chin complied with the standard of care on April 30, 2007 in not performing a biopsy of the raw denuded tongue area because her symptoms were consistent with a thrush infection and could be consistent with her complaints of acid reflux. Dr. Ghali testified that Dr. Chin complied with the standard of care in August 2007 by treating her fungal condition and referring her for a biopsy. Dr. Ghali testified that several of plaintiff's medications can cause oral lesions and thrush. He also found it significant that none of the non-defendant doctors treating plaintiff observed a cancerous lesion,

including Dr. Gitelman, a dentist who examined her in April 2007, and the lack of a tumor present on the March 2007 CT scan. Dr. Ghali testified that if a cancerous tumor were present before, any doctor evaluating plaintiff's mouth would have found the mass "under his nose."

¶ 38 On cross-examination, Dr. Ghali testified that most tongue cancers occur on the lateral border of the tongue. He believes that plaintiff had a fast-growing tumor for two or three months before it was diagnosed. The standard of care requires a biopsy of a lesion which has been present for two weeks and has not resolved on its own. The tongue and left side of the cheek cannot have a homogenous lesion because the cheek and tongue are not continuous and separated by the teeth. In Dr. Ghali's opinion, there were two lesions, one on the tongue and one on the cheek and Dr. Chin felt them to be "similar but discontinuous" and Chin did not need to biopsy both lesions if the lesions looked similar.

¶ 39 Drs. Taugner and Kelly called Dr. Peter Hurst, a dentist, as their expert witness. Dr. Hurst testified that Dr. Taugner and Dr. Kelly met the standard of care in treating plaintiff and that she did not develop cancer until August 2007. He opined that Dr. Taugner's May 15, 2006 diagnosis of irritation from the prophy-jet was reasonable. Dr. Taugner properly referred plaintiff to Dr. Chin for a biopsy in August 2006 when he saw the lesion had gotten worse. Dr. Hurst testified that cancer of the tongue is painful and once a tumor starts to burrow it causes persistent unremitting pain. Because plaintiff did not complain of pain in her tongue in May, August and December 2006, she did not have squamous cell carcinoma at that time. Further there was no evidence that plaintiff complained of mouth pain until later in 2007. He testified that based on the measurements of the tumor in late 2007, within several weeks it grew 3 centimeters and this was indicative of a fast and aggressive tumor. Plaintiff's cancer started on the surface of the

tongue and went downward into the tongue. Because cancer does not start in one spot and then leave and reappear in another and plaintiff did not complain of pain, Dr. Kelly met the standard of care at the December 2006 appointment. In April 2007, it was within the standard of care for Dr. Taugner to defer to Dr. Chin's judgment as an oral surgeon. Lastly, if a tumor had been growing in the left lateral part of plaintiff's tongue in March 2007, it should have been visible in the CT scan ordered by Dr. Fishman. He notes that the later October 2007 CT scan did show evidence of a tumor on the left lateral border of the tongue. On cross-examination, he testified that except for the biopsy diagnosis of lichenoid features, it would be reasonable to interpret the records to indicate that the lesion was in the same area at all visits and the cheek and tongue lesions were actually two separate lesions, although adjacent.

¶ 40 *Defendant Chin's Video Evidence Depositions*

¶ 41 Consistent with the trial court's ruling denying motion *in limine* No. 41, Dr. Chin presented the videotaped evidence depositions of six Washington, D.C. non-defendant doctors who examined plaintiff during the relevant 15-month time period. Dr. Chin presented the depositions of: Dr. Michael Albert, a gastroenterologist; Dr. Henry Fishman, an allergist; Dr. Gary Koritzinsky, an internist; Dr. Jeffrey Gitelman, a dentist; Dr. Lawrence Klein, an internist; and Dr. Scott McNamara, otolaryngologist and reconstructive surgeon. Plaintiff did not object at the time the video depositions were presented at trial.

¶ 42 Dr. Albert, a gastroenterologist, testified that he began treating plaintiff in November 2006. Plaintiff complained of having a sore throat, flu-like symptoms and bowel issues. He saw her two more times, once in March 2007 for an office visit and once in May 2007 to perform an endoscopy. He stated that he probably looked at the back of plaintiff's mouth but may not have

examined plaintiff's oral cavity.

¶ 43 Dr. Fishman testified that he treated plaintiff for allergies on September 8, 2006, November 13, 2006, February 2, 2006, March 27, 2007, July 27, 2007 and August 10, 2007. He performed a brief examination of her ears, nose, throat and chest on the first appointment. He is not trained to evaluate a patient's mouth and throat. When he examines a patient's mouth he performs a quick evaluation of the tongue and portion of the pharynx. He does not typically examine the lateral borders of the tongue unless mentioned as symptomatic by the patient. If he had observed any abnormalities of her mouth or throat he would have so noted in his records. He diagnosed her with asthma and treated her with anti-inflammatory medicines and an inhaler. He did not recall plaintiff reporting any problems with her mouth and he did not document any abnormalities of the mouth, like thrush. He is not familiar with the presentation of lichen planus. He ordered a CT scan of her sinuses in March of 2007, which showed no sinus abnormalities.

¶ 44 Dr. Koritzinsky, an internist, testified that he began treating plaintiff in 2002. He saw her during the relevant time period on March 7, 2006, April 20, 2006, January 3, 2007 and February 5, 2007. He has a limited training in evaluating a patient's head, neck, ears, nose and throat. Generally, he only examines a patient's mouth by using a tongue depressor to look at a plaintiff's throat and tonsils. He does not evaluate a patient's tongue unless there are symptoms indicating a concern. He has treated patients with thrush before and knows how to identify lichen planus. Plaintiff was using a prescribed steroid inhaler which could be associated with thrush. At her March 7, 2006 appointment he noted sinus drainage in her throat but no other abnormalities of her mouth or tongue. His practice is to note down all abnormalities he observes. At the April 20, 2006 and January 3, 2006 appointments, she did not complain of any mouth concerns and did not

inform him of the previous cheek biopsy. At the January 2007 appointment he examined the back of her throat and noted sinus drainage. On February 5, 2007, he examined her for preoperative clearance for cataract surgery. She complained then of heartburn and nausea but not mouth pain. She was cleared for surgery and did not present with any abnormalities on her tongue that day. In examining her mouth, he would not have palpated her tongue nor would he have had a good view of the lateral side of her tongue. He also stated that he does not have the same expertise as a subspecialist in looking for tongue abnormalities.

¶ 45 Dr. Gitelman, a dentist, testified that he examined plaintiff once in April 2007. Based on his examination, he diagnosed plaintiff with "erosive lichen planus" which included an ulcerated lesion. He testified that cancer and severe erosive lichen planus look similar. He advised her to see her doctors in Chicago to evaluate the ulcer. He did not biopsy the ulcer because she was only to see him for that one visit.

¶ 46 Dr. Klein, another internist, examined her on July 19, 2007, September 10, 2007 and September 23, 2007. He did not receive formal training in evaluating the mouth and has never palpated plaintiff's tongue. As such, he would defer any concern about a mass on a patient's tongue to a specialist. On September 10, 2007, he observed two areas of concern in plaintiff's mouth. One was an erythema in the oral cavity and the other was an ulcer on the left lateral side of her tongue. He prescribed plaintiff Diflucan, a medicine for thrush. Plaintiff returned for a follow up on September 23, 2007. Dr. Klein observed that the ulcer had not changed in size nor had it improved. He referred her to Dr. Edward Mopsik, an oral surgeon in Washington, D.C.

¶ 47 Lastly, Dr. McNamara, an ear, nose and throat specialist, testified that he saw plaintiff on July 30, 2007 and August 15, 2007 to perform a laryngoscopy exam. He does not consider

himself an expert in diagnosing mouth conditions. During his exams of plaintiff, he did not palpate the back or middle part of plaintiff's tongue but observed "a lot going on" in her mouth. He deferred any concerns about her mouth conditions to a specialist. He did not recommend a biopsy because he was aware of the 2006 biopsy by Dr. Chin. He also testified that in 2003, while examining plaintiff, he observed a painless ulcer on the bottom of her tongue. He did not biopsy the ulcer because it was not suspicious and did not warrant a biopsy.

¶ 48 *Closing Arguments*

¶ 49 In closing argument, plaintiff argued the credibility of both her testimony and that of her expert witnesses. She argued that the evidence showed defendants breached the applicable standard of care because at each and every appointment they noted a lesion on the left lateral side of her tongue, yet did not inform her it might be cancer and failed to properly refer her for a biopsy or perform a biopsy of the tongue lesion and defendants' failure to diagnose the lesion as cancer. Plaintiff added that defendants are trained professionals who look for abnormalities in the oral cavity whereas the non-defendant doctors from Washington, D.C. are not. The lesion did not disappear when she visited the non-defendant doctors, but rather, they did not see the cancerous lesion because they are not trained to evaluate and diagnose this condition.

¶ 50 Defendants Taugner and Kelly argued three main points in closing: (1) plaintiff failed to complain about her condition and alleged mouth pain to the defendants despite many appointments and phone calls with Dr. Taugner; (2) although plaintiff presented with lesions and lichen planus during the time period at issue, there was no evidence to suggest the lesions or other mouth conditions were in fact cancerous; and (3) the non-defendant doctors who treated plaintiff during this 15-month period either did not see a lesion or cancer and did not note any

suspicious mouth condition which required a biopsy, therefore, to show defendants were professionally negligent, plaintiff was required to discredit all "nine doctors and say they all missed it."

¶ 51 Defendant Chin argued that he was always concerned about cancer as a differential diagnosis as well as thrush and lichen planus. Chin performed the cheek biopsy because of his concerns. The biopsy disclosed the presence of lichenoid features, an autoimmune disease that comes and goes. He informed Geyer that, if she observes any changes in her mouth, to come back for a follow up appointment. Seven months later she returned. During that time the non-defendant doctors had

> "an opportunity to look into this patient's mouth and an opportunity to talk to this patient about what was going on with her medical condition. And nobody from September of 2006 until April of 2007 noted any problems. The patient didn't report specific problems about her tongue. The doctors were looking in there. Sure, they weren't grabbing her tongue with a piece of gauze and flipping it around. Everyone was looking in there, and all of these people are all trained medical professionals. And I would suggest to you if there was something going on, a 2-centimeter lesion; somebody else would have seen it."

Plaintiff did not object during defendants' closing arguments. In rebuttal, Geyer highlighted the credibility of her expert witnesses' testimony.

¶ 52 The trial court instructed the jury to resolve the case by determining the facts, following the law, weighing evidence presented and judging the credibility of the witnesses. The trial court specifically stated that the evidence heard regarding timeliness of plaintiff's calls to defendants

about her condition or to attend follow up appointments is to "be considered by you solely as it relates to whether the defendants complied with the standard of care. It should not be considered by you for any other purpose."

¶ 53 The jury returned a general verdict in favor of the defendants. The jury answered "No" to four special interrogatories asking whether defendants were negligent and, if so, whether that negligence was the proximate cause of plaintiff's injuries. The court entered judgment on the verdict.

¶ 54 Plaintiff moved to vacate the trial court's entry of judgment in favor of defendants and also moved for a new trial. Plaintiff argued: (1) the verdict was against the manifest weight of the evidence; and (2) plaintiff was prejudiced and deprived of a fair trial because improper evidence and argument was presented to the jury regarding: plaintiff's contributory negligence and testimony from the non-defendant doctors regarding health care concerns not at issue in this lawsuit, in violation of the court's rulings on plaintiff's motions *in limine* Nos. 39, 40 and 41. The trial court denied that motion and this timely appeal followed.

¶ 55 ANALYSIS

¶ 56 Plaintiff raises two issues on appeal: whether the jury verdict was against the manifest weight of the evidence; and, in the alternative, whether the trial court erred in denying plaintiff's motion for a new trial. We find that plaintiff did not receive a fair trial and accordingly reverse the trial court's order denying her motion for a new trial.

¶ 57 A reviewing court will not reverse a trial court's ruling on a motion for a new trial unless the trial court committed an abuse of discretion. *Sharbono v. Hilborn*, 2014 IL App (3d) 120597, ¶ 24. To determine whether an abuse of discretion occurred, we must consider whether the

moving party was denied a fair trial. *Rutledge v. St. Anne's Hospital*, 230 Ill. App. 3d 786, 189 (1992).

¶ 58 Plaintiff argues that the trial court erred in denying plaintiff's posttrial motion because the trial court allowed the defendants to introduce the videotaped depositions of the non-defendant doctors and allowed the defendants to build on the evidence by making improper references to plaintiff's own conduct related to her dealing with her mouth condition along with her other unrelated health conditions.

¶ 59 Plaintiff contends that defendants had two main defense theories. First, the defense position was that there was no cancerous lesion on her tongue until August 2007. To support this theory, defendants relied on the videotaped deposition testimony of the non-defendant Washington, D.C. doctors who treated plaintiff for unrelated ailments who either did not order a biopsy or did not notice any lesions between May 2006 and August 2007. Second, defendants argued that plaintiff's own conduct and preexisting health conditions contributed to her injuries even though the trial judge ruled this evidence was barred. Plaintiff contends that defendants used improper testimony and argument to bolster their theories of the case to the extent that she was prejudicially denied a fair trial.

¶ 60 Defendants respond arguing that plaintiff waived review of the admission of the non-defendant doctors' testimony and alleged prejudicial references to her conduct and health conditions because she did not object at the time the videotaped statements were introduced. Generally, to preserve arguments of a trial court error in allowing evidence or permitting improper argument by opposing counsel, the appellant must raise an objection to the alleged error at the time it occurred.

¶ 61 Plaintiff asserts that although she did not object at the time the videotapes were played, she did file a motion *in limine* to bar the videotaped testimony, and therefore, was not required to later object. Plaintiff contends that this was a close case that should have been determined on the basis of the expert testimony of whether the defendants complied with the applicable standard of care and that the introduction of irrelevant, misleading and distracting testimony of the non-treating Washington, D.C. doctors coupled with defendants' improper use of that testimony to suggest there was no lesion on her tongue at the times she saw the non-defendant doctors, that defendants did not have a duty to biopsy the lesion because all the non-defendant doctors "missed it," and repeated references to plaintiff's other medical conditions and her own conduct, prevented plaintiff from receiving a fair trial.

¶ 62 The question is whether the testimony of the non-defendant doctors and arguments of defendants' attorneys were errors so egregious as to deprive plaintiff of a fair trial, and whether, her failure to raise objection at trial to the statements and testimony is fatal to her claim on appeal.

¶ 63 A trial court's ruling on a motion *in limine* addressing the admissibility of evidence is subject to reconsideration. *Jones v. Rallos*, 384 Ill. App. 3d 73, 88 (2008). If a party fails to object in a timely manner to a statement, testimony or evidence made at trial, any claim of error therefrom is waived and not preserved for our review. *Simmons v. Garces*, 198 Ill. 2d 541, 567 (2002). "A party may not rely on a court's ruling on a motion *in limine* to preserve an error for appellate review" and "must object the first time the testimony is introduced" to preserve the issue for review." *Steele v. Provena Hospitals*, 2013 IL App (3d) 110374, ¶ 40. Recently in *People v. Denson*, 2014 IL 116231, our supreme court explained that in civil cases, after a trial

court has ruled on a motion *in limine* to admit disputed evidence, a contemporaneous trial objection is required when the evidence is presented to preserve the dispute for review. *Id*. ¶ 19. A litigant is not required to repeat the objection each and every time similar evidence is presented after the motion *in limine* was denied, but the litigant must object at least the first time the evidence is introduced. *Illinois State Toll Highway Authority v. Heritage Standard Bank & Trust Co.*, 163 Ill. 2d 498, 502 (1994).

¶ 64 In this case, plaintiff brought three motions *in limine* specifically to bar the inclusion of testimony, reference or argument to the alleged error from which plaintiff now complains: (1) the non-defendant doctors' testimony (motion *in limine* No. 41); (2) plaintiff's conduct, *i.e.* contributory negligence (motion *in limine* No. 40); and (3) her preexisting health conditions (motion *in limine* No. 39). In granting Geyer's motion *in limine* No. 40, the trial court definitively ruled there would be no evidence of contributory negligence. The trial court granted in part and reserved in part motion *in limine* No. 39 and denied motion *in limine* No. 41. In reserving in part plaintiff's motion *in limine* No. 39, the trial court told the parties that it wanted to hear more before allowing testimony or reference to certain medical conditions.

¶ 65 With respect to the non-defendant doctors' testimony, plaintiff's motion *in limine* No. 41 specifically sought to: (1) bar any evidence, reference or argument to a non-defendant doctors' failure to observe or document a lesion; (2) bar any reference and examination of any witness with any argument regarding the non-defendant doctors' records or deposition testimony; (3) bar any witness from testifying at trial regarding the non-defendant doctors' examinations of plaintiff's oral cavity and their failure to observe a tongue lesion; and (4) any argument or innuendo that Dr. Gitelman's exam or diagnosis relates in any way to what defendants' conduct

should have been or whether they complied with the standard of care. Plaintiff argued that any probative value that could be gleaned from the non-defendant doctors' lack of notation regarding a lesion or failure to refer plaintiff for a biopsy is slight and is substantially outweighed by the danger of confusing and misleading the jury resulting in unfair prejudice to plaintiff.

¶ 66 The parties agree that the trial court denied plaintiff's motion *in limine* to bar the testimony of the treating physicians from Washington, D.C., all of whom were to testify via videotaped evidence deposition. It is true that the ordinary practice would have required plaintiff to renew her objection at the time that the evidence was presented live to the jury, because one would have to wait to see if defendants followed through and asked the questions that would trigger the objection. In such a situation, the requirement of the contemporaneous objection makes perfect sense, but these witnesses all appeared via video evidence depositions that had been specifically reviewed by the trial court at the time that it overruled plaintiff's motion to exclude the testimony. Under these circumstances, we consider the objection was preserved at the time that the court ruled on the motion *in limine* and plaintiff should not be held to have waived objections when the pre-recorded videos were shown to the jury. As for the improper statements in closing argument, plaintiff submits that she was not required to object because the objections were made and the evidentiary die was cast before the trial started and a subsequent objection in argument was superfluous. Defendants respond simply by stating that the issue has been forfeited by the failure to make the later objections.

¶ 67 Forfeiture is a limitation on the parties and not the reviewing court (*King's Health Spa, Inc. v. Village of Downers Grove*, 2014 IL App (2d) 130825, ¶ 59) and we may exercise our power to review an otherwise forfeited complaint of error where justice so requires (*Bank of*

Homewood v. Chapman, 257 Ill. App. 3d 337, 343-44 (1993)). Furthermore, we may review forfeited issues pursuant to the plain error doctrine in civil cases (134 Ill. 2d R. 615 (a)) when prejudicial arguments were made, without objection or interference of the trial court, such that "the parties litigant cannot receive a fair trial and the judicial process stand without deterioration." (Internal quotation marks omitted.) *Gillespie v. Chrysler Motors Corp*., 135 Ill. 2d 363, 375 (1990).

¶ 68 Plaintiff argues that pursuant to Illinois Supreme Court Rule 366(a)(5) (155 Ill. 2d R. 366 (a)(5)), we may review these forfeited issues to ensure a just result and to maintain a uniform body of precedent. We are persuaded that the nature of the case and the issue of medical negligence involved and nature and extent of the errors complained of warrant the exercise of our authority under Rule 366(a)(5) to review the substance of her arguments for a new trial. *Bank of Homewood*, 257 Ill. App. 3d at 343-44.

¶ 69 *Testimony of Non-Defendant Doctors*

¶ 70 Whether plaintiff was denied a fair trial requires review of the evidence, testimony and statements made throughout the trial.

¶ 71 After the trial court ruled on the motions *in limine*, plaintiff sought to minimize the anticipated video testimony by explaining that those providers were not in a comparable capacity as the defendants. Dr. Chin argued in his opening statement that all the non-defendant doctors who saw plaintiff during the 15-month period, did not observe a lesion in her mouth and, if they did find an abnormality, it was the same benign conditions diagnosed by defendants. Dr. Chin specifically referenced Dr. Gitelman stating Dr. Gitelman will testify to palpating the tongue and his lichen planus diagnosis and "he has a lot of expertise in the performance of biopsies, and that

if he wanted to do a biopsy on that date, on April 6, 2007, he could certainly have done one. He chose not to do one. Why? Because there were no clinical indications to do so. There was no evidence based on his exam that this patient had cancer."

¶ 72 Taugner and Kelly's counsel in opening statements argued that Dr. Gitelman, who plaintiff saw for mouth soreness, found that plaintiff "had erosive lichen planus, not cancer. The evidence is going to show and you're going to hear Dr. Gitelman say he didn't recommend a biopsy; didn't think it was cancer. He did, however, say follow up with the dentist – Dr. Chin in Chicago." At one point, Drs. Taugner and Kelly's counsel argued that "the plaintiff has to discredit all of these. It's an incredible case that they have to do. They have to take nine doctors [non-defendant doctors] and say they all missed it."

¶ 73 Because of the trial court's *in limine* rulings and the jury being conditioned by defense opening statements regarding this evidence, plaintiff argues that allowing the defendants to present the deposition testimony of the non-defendant doctors prejudiced her because it was not relevant to the issue of whether these defendants, or any of them, breached the applicable standard of care. Defendants admitted a lesion was present every time plaintiff was seen by the defendants after May 2006. Defendants essentially admitted the lesion was observed by the defendants so there was no probative value to the jury hearing that other non-defendant medical providers either did or did not observe the lesion. These non-defendant doctors included her gastroenterologist, allergist, two internists, facial plastic reconstructive surgeon and a dentist who was not licensed as an oral surgeon. These medical providers do not have the same expertise as the defendant dentists and an oral surgeon; these non-defendant doctors are not specialists in diagnosing mouth conditions and did not perform an examination that would have disclosed the

lesion. The Washington, D.C. providers were not consulted for the same purpose that defendants were consulted and were not sufficiently shown to be held to the same standard of care as the defendants. The testimony from the non-defendant doctors cannot be used to prove or infer the absence of a lesion, where the defendants observed a lesion. When the defendants observed the lesion the issue became what standard of care applied, not what another provider did or failed to do at some other time under some other circumstance. Clearly, plaintiff did not have "to discredit all of these" non-defendant doctors nor did plaintiff "have to take nine doctors [non-defendant doctors] and say they all missed it."

¶ 74 By allowing the testimony of a gastroenterologist, an allergist, two internists, a facial plastic reconstructive surgeon and a dentist not licensed as an oral surgeon, defendants were allowed to divert and mislead the jury to create a false impression that there was a question as to whether there was a lesion on plaintiff's tongue, where defendants admitted a lesion was present at all relevant times. Cancerous lesions do not appear, disappear and then reappear. Thus, because the defendants admitted there was something wrong, the question left for the jury was what standard of care did the defendants, not the non-defendants, have to meet. Defendants properly presented expert testimony on this issue, however, the evidence of the non-defendant provider records and testimony allowed the jury to then consider matters irrelevant to the issue of a breach of the standard of care applicable to defendants.

¶ 75 This error was magnified in defendants' closing statements when defendants argued that their failure to biopsy the tongue was justified by the fact that the non-defendant doctors did not think a biopsy was necessary, improperly emphasizing to the jury that plaintiff had a burden to prove all the non-defendant doctors were also to blame, stating Geyer "want[s] you to believe

everybody got it wrong." Plaintiff argues that defendants' improper argument shifted the burden of proof interjecting a misleading and prejudicial theory of the case.

¶ 76 "Generally, a party is not entitled to reversal based upon evidentiary rulings unless the error was substantially prejudicial and affected the outcome of the case." *Taluzek v. Illinois Central Gulf R.R.*, Co., 255 Ill. App. 3d 72, 83 (1993). Only relevant evidence is admissible at trial. *Maffett v. Bliss,* 329 Ill. App. 3d 562, 574 (2002). "[E]vidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the determination of the action either more or less probable than it would be without the evidence." *Downey v. Dunnington*, 384 Ill. App. 3d 350, 387 (2008); Ill. R. Evid. 401 (eff. Jan. 1, 2011). However, "even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice (Ill. R. Evid. 403 (eff. Jan. 1, 2011))." *People v. Starks*, 2014 IL App (1st) 121169, ¶ 60.

¶ 77 In the instant case, the issue was whether defendants deviated from the standard of care and whether there was a causal connection with the injury. *Simmons v. Garces*, 198 Ill. 2d 541, 556 (2002). Defendants claim that they and their experts relied on the non-defendant doctors' observations to prove that no one saw a cancerous lesion in her mouth during the 15-month time period and in fact only saw fungal conditions present in her oral cavity during that time. This argument is without substance because our view of the record shows that defendants Taugner and Kelly did observe a suspicious condition causing Taugner to refer plaintiff to Chin for a tongue biopsy and Chin, also observing a similar condition, did a biopsy of the cheek not the tongue. Clearly, it is the standard of care that defendants were bound to at that time, and what the non-defendant doctors did or did not see or do is of no relevance.

¶ 78 "Defining the standard of care is generally entrusted to medical professionals and it is, by definition, restricted to the time the defendant doctor was responsible for the patient's care." *Steele*, 2013 IL App (3d) 110374, ¶ 58. "The determination of whether a doctor acted in compliance with the applicable standard of care is limited, by definition, to the circumstances with which he was confronted at the time the medical service was rendered." *Id*., ¶ 60. Therefore, the focus of inquiry here is what did Taugner, Kelly and Chin do or fail to do while plaintiff was in their care based on what they knew, should have known, or were reasonably capable of knowing while Geyer was in their care. *Id.*

¶ 79 As argued by defendants, the testimony of the non-defendant doctors was used by defendants to show the absence of cancer while they treated Geyer. However, even the stated intention for the use of the testimony is improper because it is the equivalent of a medical diagnosis that there was no lesion or cancer until July/August 2007 and is not relevant to any element of the claim of defendants' alleged professional negligence. *Steele*, 2013 IL App. (3d) 110374, ¶ 45-49 (a witness not tendered nor qualified as an expert cannot be permitted to testify about what medical condition a patient might have had based on visual observation and such evidence cannot be used to support the inference that a patient had that medical condition). The Washington, D.C. doctors testified that they are not trained in oral surgery; did not see plaintiff for the same concerns and reasons as defendants; and did not palpate her tongue or examine her oral cavity. We find this testimony had no relevancy to this claim of medical negligence and whether defendants breached the standard of care in the period from 2006-2007 that caused the delayed diagnosis of tongue cancer and defendants should not have been allowed to present the Washington, D.C. doctors' testimony to infer that defendants did not breach the standard of care.

¶ 80 Second, there is the question of defendants' actual and cumulative use of the non-defendant doctors' testimony.

¶ 81 In plaintiff's opening statement, following the denial of motion *in limine* No. 41, plaintiff's counsel discussed the non-defendant doctors who treated plaintiff during the 15-month time period from May 2006 to August 2007 and had been disclosed as trial witnesses by defendants. Counsel explained that the non-defendant doctors saw plaintiff for a myriad of reasons not related to a mouth lesion, including horse vocal cords, reflux, asthma and that these doctors were not trained experts in dentistry or oral surgery, and therefore could not have diagnosed a cancerous tongue lesion, with the exception of Dr. Gitelman, a dentist who diagnosed plaintiff with erosive lichen planus and recommended plaintiff see defendants. This argument was expected due to the earlier ruling by the trial court.

¶ 82 Dr. Chin argued in his opening statement that all the non-defendant doctors who saw plaintiff during the 15-month period Drs. Chin, Taugner and Kelly treated her, did not observe a lesion in her mouth and, if they found an abnormality, it was due to the benign conditions diagnosed by defendants. Dr. Chin specifically referenced Dr. Gitelman and argued that Dr. Gitelman will testify to palpating the tongue and lichen planus diagnosis and "he has a lot of expertise in the performance of biopsies, and that if he wanted to do a biopsy on that date, on April 6, 2007, he could certainly have done one. He chose not to do one. Why? Because there were no clinical indications to do so. There was no evidence based on his exam that this patient had cancer."

¶ 83 Taugner and Kelly's counsel in opening statements argued that Dr. Gitelman, who plaintiff saw for mouth soreness, found that plaintiff "had erosive lichen planus, not cancer. The

evidence is going to show and you're going to hear Dr. Gitelman say he didn't recommend a biopsy; didn't think it was cancer. He did, however, say follow up with the dentist – Dr. Chin in Chicago." At one point, Drs. Taugner and Kelly's counsel argued that "the plaintiff has to discredit all of these. It's an incredible case that they have to do. They have to take nine doctors [non-defendant doctors] and say they all missed it." Plaintiff argues these statements are prejudicial and irrelevant to the negligence claim and without them, the verdict would have been different.

¶ 84 A "trial must be conducted in an orderly manner and be free from any error that is likely to influence the jury." *Ryan v. McEvoy*, 20 Ill. App. 3d 562, 565 (1974). A party's improper argument can be a sufficient basis on which to require a new trial. *Rutledge,* 230 Ill. App. 3d at 790. An argument by counsel that "three out of four doctors can't be wrong" is improper in defending an action for professional negligence. *Ferro v. Griffiths*, 361 Ill. App. 3d 738, 743 (2005). Here, it was prejudicial to plaintiff to allow the jury to consider the non-defendant doctors' testimony and use that testimony to argue an erroneous standard makes it highly likely that the jury was misled and confused by defendants' use of that testimony in their statements to the jury, tipping the scales in the favor of defendants because of this error.

¶ 85 The inadmissible testimony ignores evidence contrary to defendants' records showing that defendants admitted the lesion was present at every appointment. The error was to allow defendants to establish a defense not based on what they saw and did, but on what the Washington, D.C. providers did not see and did not do. It is not appropriate to defend a medical malpractice case on the basis of what other's did or did not do. This evidence forced the plaintiff to attempt to discredit the medical competency of six doctors that were not on trial and attack

their credibility and competency in what they observed and, at the same time, be required to present expert testimony focused on the defendants' negligence. No matter how successful, a jury would be distracted and confused while considering defendants' compliance with the standard of care along with considering whether six additional professionals, regardless of their denials and lack of training and absent expert testimony directed against them, would or should have seen the lesion and would or should have questioned Geyer about her mouth pain even though that was not within their specialty.

¶ 86 Stated bluntly, plaintiff was at a prejudicial disadvantage in tackling the relevance of the videotaped testimony of the out-of-town non-defendant doctors. In essence, defendants used this testimony to improperly assert two distinct propositions: that plaintiff was somehow obligated to prove that all of these doctors were *also negligent* and that plaintiff herself was *contributorily negligent*. Furthermore, defendants slyly suggested that the lesion observed in May and August 2006 in Chicago must have somehow abated because the Washington, D.C. doctors failed to observe one. This suggestion is particularly pernicious because defendants uniformly agreed that there was always a lesion in plaintiff's mouth, even though they claimed it *did not become cancerous* until the summer of 2007. This evidence and these arguments were improper, both because of the court's correct ruling barring any suggestion that plaintiff was contributorily negligent and because plaintiff bears no burden of proving the negligence of a non-defendant.

¶ 87 *References to Plaintiff's Conduct and Other Health Conditions*

¶ 88 Plaintiff also contends that defendants improperly commented about her conduct and other health conditions that were so prejudicial that she was not afforded a fair trial.

¶ 89 Prior to trial, plaintiff filed motion *in limine* No. 39 to bar references to certain

preexisting medical conditions and medications. The trial court granted this motion stating that defendants did not file an affirmative defense for contributory negligence and "[w]e don't want the jury to be confused that the plaintiff is to blame for anything that has happened here." Plaintiff argues that defendants made improper arguments pointing at plaintiff's other unrelated health conditions, medicines and her indifference to her health as a cause of her injuries and to defend the claim of professional negligence. Plaintiff contends defendants violated this order.

¶ 90 Plaintiff also filed motion *in limine* No. 40, directed at barring any evidence or argument referencing comparative negligence or contributory negligence and failure to mitigate damages. Dr. Chin had filed an affirmative defense alleging that plaintiff was at least 50% responsible for the outcome of her medical condition in that she failed to follow Chin's treatment recommendations and return for follow up appointments. The trial court held a lengthy hearing and ultimately granted plaintiff's motion *in limine* to bar use or reference to this defense. At the hearing, Dr. Chin argued that he was entitled to present evidence regarding his affirmative defense. The trial court reviewed Dr. Chin's expert reports and deposition testimony and determined that there was no evidence to support Dr. Chin's affirmative defense and, therefore, barred reference to the affirmative defense. Plaintiff contends that despite the trial court's holding, defendants referred to plaintiff's conduct regarding follow up appointments, the failure to complain about her mouth pain, and her failure to follow doctor's directives.

¶ 91 Improper comments during opening and closing arguments do not constitute reversible error unless the opposing party is substantially prejudiced and denied a fair trial, when the trial is viewed in its entirety. *Stennis v. Rekkas*, 233 Ill. App. 3d 813, 829-30 (1992).

¶ 92 During *voir dire* Dr. Taugner and Kelly's counsel asked the venire whether they had a

position on following a doctor's directions. Dr. Chin asked the venire whether they have ever been told by a doctor to have a procedure or take a medication and failed to do so. When one venire member responded affirmatively, Chin's counsel inquired whether she understood that this could cause her harm. During opening statements, defendants' counsel referred to plaintiff's conduct in not following up with defendants when requested and that she did not complain about her tongue to the non-defendant doctors, suggesting comparative negligence by plaintiff.

¶ 93 Plaintiff also complains that during the trial and in defendants' closing arguments, they argued and made reference to: plaintiff's other health conditions including a "complex medical history"; her "failure" to complain or seek care for her tongue lesion and that she should have taken a more active role in her care; her "failure" to follow doctor's recommendations; and the testimony of her non-defendant doctors to establish that defendants were not negligent because none of her non-defendant doctors identified a cancerous lesion on her tongue during the relevant period. At one point, Taugner and Kelly's counsel stated, "[h]ow did she develop squamous cell carcinoma? That came on without warning. And these other [medical] conditions can come on without warning. She's in her 70s. She's on a laundry list of medications. Does it take a stretch to think at this point she's developing these oral manifestations, these growths?" Also, after her cheek biopsy in 2006, Geyer was informed that the biopsy was benign. Defendants testified that they put the onus on plaintiff to report any changes to a (benign) lesion even though they admitted that Geyer could not see it. Then at trial, the defendants argued her failure to report any changes to defendants (or the non-defendant doctors) to infer that the initial lesion went away and a new, unrelated lesion appeared at every appointment thereafter.

¶ 94 The failure of a patient to report physical changes in their condition for one month cannot

be introduced in an action for failing to timely diagnose cancer. *Barenbrugge v. Rich*, 141 Ill. App. 3d 1046 (1986). Any argument or evidence regarding a patient not following a doctor's order constitutes contributory negligence. *Witherell v. Weimer*, 118 Ill. 2d 321 (1987). Similarly, the failure to report continuous pain to a treating physician raises issue of patient negligence. *Id.* The inference that a delay in treatment caused by a plaintiff is contributory negligence cannot be introduced at trial where there is no evidence in the record to support the conclusion that a plaintiff's delay enhanced the injury. *Bartimus v. Paxton Community Hospital*, 120 Ill. App. 3d 1060 (1983).

¶ 95 The trial court forbade the defendants from asserting any argument or defense of comparative negligence, and admonished the jury that the parties' opening and closing statements were not evidence, nevertheless defendants made these prohibited statements. It is clear that these limiting instructions had no effect on the defense because these statements were made in violation of the court's ruling on motion *in limine* No. 40 that barred any attack on plaintiff 's actions or inactions, her age and other preexisting conditions to infer that their clients did nothing wrong. The failure to contemporaneously object does not convert these prejudicial errors into harmless error where the cumulative effect is to deprive plaintiff of her right to have the issue of medical negligence resolved by consideration of only relevant expert evidence.

¶ 96 Viewed separately, a trial court's errors may not require a new trial; however, when considered collectively, erroneous rulings require that the plaintiff be given another opportunity to present her case, a new trial must be ordered. *Netto v. Goldenberg*, 266 Ill. App. 3d 174, 184 (1994). "Reviewing courts are not concerned that parties receive error-free trials. [Citation]. Our concern is whether the plaintiff received a fair trial, one free of substantial prejudice. A new trial

is necessary when the cumulative effect of trial errors so deprives a party of a fair trial that the verdict might have been affected. [Citation]." *Id*. A plaintiff's right to a fair trial has been compromised where upon reviewing the record, the reviewing court cannot say that the errors when viewed cumulatively, did not affect the verdict. *Id*. Where a party's arguments were improper, prejudicial, and denied the complaining party a fair trial, when the trial is viewed in its entirety, a new trial may be warranted. *Stennis v. Rekkas,* 233 Ill. App. 3d 813, 829-30 (1992). In the instant case, we find that plaintiff's right to a fair trial was compromised and reviewing the entire record, we cannot say that these errors did not affect the verdict.

¶ 97 Here, it is highly likely that the jury was misled by the nature of defendants' arguments and presentation of the non-defendant doctors' testimony to infer that no lesion was present (although defendants had testified to the contrary); that plaintiff is a patient who does not tell doctors when she is in pain (suggesting she did not provide them with information allowing them to diagnose her true condition); that plaintiff was on medications that caused her cancer or underlying diagnosis of a fungal infection; that plaintiff does not follow doctor's directions; and that all nine doctors, the Washington, D.C. doctors included, failed to see a cancerous lesion and therefore, she did not have cancer while under defendants' care.

¶ 98 The record shows the trial court was aware that defendants did not have evidence to support any allegation that plaintiff failed follow up with the defendants or that she did not follow their orders. In fact, prior to trial and after review of the defendants' evidence, the trial court granted plaintiff's motion *in limine* No. 40 to bar any evidence or argument as to plaintiff's comparative or contributory negligence. Yet defendants persisted throughout the trial in using inadmissible evidence to infer plaintiff's conduct was the reason for her delayed diagnosis and

treatment. The jury should have heard only qualified expert testimony on the issue of whether there was a breach of the applicable standard of care by the defendants. In conclusion, we find it likely that the improper inference and argument made by defendants founded on the irrelevant non-defendant doctors' testimony coupled with plaintiff's conduct impermissibly affected the jury's verdict and, in the interest of justice, a new trial is ordered. *Gillespie*, 135 Ill. 2d at 377 (the court may grant a new trial as justice may require where a "prejudicial error was so egregious that it deprived the complaining party of a fair trial").

¶ 99 Because we are remanding this matter for a new trial, we need not reach plaintiff's arguments that the jury's verdict was against the manifest weight of the evidence.

¶ 100 CONCLUSION

¶ 101 Based on the foregoing, the matter is reversed and remanded for a new trial. We find that the cumulative effect of the non-defendant doctors' testimony in addition to the improper comments of the defendants' attorneys resulted in an unfair trial for plaintiff.

¶ 102 Reversed and remanded.