

February 11, 2013

No. 1-10-3664

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOYCE BONNER,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
v.)	
)	No. 04 L 9555
ELLIOTT OSTRO, D.D.S.,)	
)	
Defendants-Appellant.)	Honorable
)	Richard J. Elrod
)	Judge Presiding.
)	

JUSTICE SIMON delivered the judgment of the court.
Justices Quinn and Connors concurred in the judgment.

ORDER

¶ 1 *HELD:* The circuit court did not err by permitting plaintiff's expert to testify regarding the standard of care for placing tooth implants because the witness, a licensed dentist, was qualified to place implants and was familiar with the methods, procedures, and treatments ordinarily observed by dentists similarly situated to defendant in relation to pre-surgery planning and decision making. Defendant was not denied a fair trial by counsel for plaintiff's alleged violations of Rule 213 where some of the challenged testimony related to matters disclosed in plaintiff's Rule 213(f) disclosures and defendant failed to establish that he was substantially prejudiced by the allegedly improper questioning. The circuit court did not abuse its discretion by allowing testimony regarding the cost of removing

and replacing plaintiff's tooth implants and repairing plaintiff's teeth with bridges because much of the challenged testimony had not been previously barred by the court, defendant has forfeited his challenges to much of the testimony by failing to raise them in his brief, and defendant has not established that the court erred by permitting the challenged testimony. Further, defendant is not entitled to a new trial based on allegedly improper comments made by counsel for plaintiff during closing and rebuttal arguments because defendant has forfeited many of his challenges by failing to object to the comments at trial or cite to supporting authority in his brief, some comments were based on evidence presented at trial, the court sustained objections to a number of the comments, and defendant has not established that he was prejudiced by any of the allegedly improper comments.

¶ 2 Defendant, Dr. Elliott Ostro, appeals from orders of the circuit court of Cook County in connection with a jury trial that resulted in a judgment of \$83,000 against defendant and in favor of plaintiff, Joyce Bonner. On appeal, defendant contends that the court erred by denying his motion to bar the testimony of plaintiff's expert witness. Defendant also contends that he was denied a fair trial where counsel for plaintiff repeatedly violated Illinois Supreme Court Rule 213 (eff. Jan. 1, 2007) and violated the circuit court's pretrial ruling on a motion *in limine*. Defendant further contends that he was denied a fair trial where counsel for plaintiff made improper comments during closing and rebuttal arguments. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 Plaintiff alleged in her complaint that she hired defendant to place dental implants in her mouth and that, in doing so, defendant had breached the standard of care applicable to a dentist performing implant surgery where defendant did not take a mold or x-rays of plaintiff's mouth prior to surgery. Plaintiff also alleged that, as a direct and proximate result of defendant's negligence, she had suffered irreparable injuries to her mouth and had spent substantial sums of money attempting to correct those injuries.

¶ 5 Prior to trial, plaintiff filed answers to defendant's interrogatories pursuant to Illinois Supreme Court Rule 213(f) (eff. Jan. 1, 2007), in which she identified Dr. Loren Goldstein as a controlled expert witness and related:

"Dr. Loren Goldstein will testify consistent with his deposition and his letter of criticism. Dr. Goldstein will also testify that he has reviewed the medical records regarding [plaintiff] and the transcripts of depositions taken in this case. His testimony will include, but not be limited to, the fact that [defendant] departed from the standard of care for dental implant surgery as he neither took a mold nor x-rays to properly place the implants with regard to the patient's bite or alignment of her existing teeth or to align the future teeth."

Plaintiff also identified Dr. Steven Potashnick as an independent expert witness and related that Dr. Potashnick would testify consistent with his deposition and medical records.

¶ 6 Defendant then filed a motion *in limine* to bar Dr. Goldstein from testifying, asserting that Dr. Goldstein was not qualified to provide an expert opinion regarding the standard of care for an oral surgeon because he was licensed as a dentist, and not as an oral and maxillofacial surgeon, and he had never placed an implant. Following argument, the circuit court denied the motion and stated that Dr. Goldstein could testify if he could show that he had a background with oral surgery that provided him with an understanding of the methods and practices of an oral surgeon.

¶ 7 Defendant also filed a motion *in limine* to bar Dr. Goldstein from testifying about the costs associated with the removal and replacement of plaintiff's implants or the costs associated with the use of conventional bridges to repair and restore plaintiff's teeth. The court denied the

motion as to testimony regarding the costs associated with removing and replacing the implants, but granted the motion as to testimony regarding the costs of bridges, stating that such costs were not related to defendant's alleged negligence because plaintiff would have required bridgework to repair her teeth had she not decided to pursue an implant treatment strategy.

¶ 8 At trial, plaintiff testified that in May 2002, she was seriously injured in a fall from a third story window, that she lost the front two teeth of her upper and lower jaws as a result of the fall, and that her physician recommended she see defendant to address the injuries to her teeth and mouth. Defendant first examined plaintiff in July 2002, at which time defendant removed a bone or tooth that had been pushed into plaintiff's upper gum and recommended dental implants, saying they would make plaintiff look like she did before the fall. Defendant did not discuss other treatment options with plaintiff or tell plaintiff how much implants would cost, but did inform plaintiff that it would take several months to complete the procedure.

¶ 9 Plaintiff also testified that about two weeks later, defendant performed a bone graft on her upper jaw, and then performed additional bone grafts over the course of several subsequent visits. Plaintiff went months without making progress, and met with defendant in February or March 2003, at which time plaintiff asked defendant when the placement of the implants would be finished. Defendant responded that plaintiff needed to be patient and that it was a long procedure. Plaintiff then met with Dr. Gutierrez, who made temporary replacement teeth, called flippers, which were placed in the spaces where she was missing teeth. In March or April 2003, defendant placed two implants in plaintiff's upper jaw, and plaintiff later learned that one of those implants had failed. Defendant then placed one implant in plaintiff's lower jaw during a separate

visit and told plaintiff that the next step was to place the replacement teeth on the implants. However, the replacement teeth were never placed on the implants and plaintiff gave up and stopped trying to get her teeth fixed by defendant in July or August 2003 because she was not making progress. In late 2003, plaintiff was examined by three dentists, Dr. Hanley, Dr. Olfers, and Dr. Cabrera, and they were all unable to use the implants placed by defendant. In early 2009, plaintiff was examined by Dr. Potashnick, who was going to repair her teeth.

¶ 10 Dr. Potashnick, a restorative dentist, testified that he first examined plaintiff on January 29, 2009, to determine whether any of plaintiff's implants were usable and took x-rays of plaintiff's mouth at that time. The x-rays showed that plaintiff was missing her number 8 and 9 teeth, the two front teeth in her upper jaw, and her number 24 and 25 teeth, the two front teeth in her lower jaw. The x-rays also showed that there was an implant in plaintiff's upper jaw in the space for tooth 8 and another implant in her lower jaw in the space between teeth 24 and 25.

¶ 11 Dr. Potashnick also testified that there was no benefit to restoring the implant in the space for tooth 8 because the implant in the space for tooth 9 had failed and plaintiff needed implants for both spaces because she was missing both teeth. In addition, Dr. Potashnick was concerned that the implant in the space for tooth 8 was too narrow to support a replacement tooth and opined that the implant would need to be removed and that bone grafting would have to be performed in the spaces for both teeth 8 and 9 to successfully place implants in those areas. Also, plaintiff's gum had closed over the implant in the space between teeth 24 and 25, and Dr. Potashnick could not determine whether that implant could be restored without first uncovering the implant. Dr. Potashnick opined that an adequate workup had not been performed prior to

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surgery to determine whether plaintiff was a candidate for implants. Dr. Potashnick further testified that restorative work on the implants would cost about \$7,000, that a permanent bridge would cost about \$12,000, that a bonded bridge would cost about \$5,000, and that a partial denture would cost between \$3,000 and \$5,000.

¶ 12 On cross-examination, Dr. Potashnick stated that he was not an oral surgeon and had never placed an implant and that he had only examined plaintiff one time and did not review any records from defendant's office prior to examining plaintiff. Dr. Potashnick also stated that it was possible for an implant to fail even if it was properly placed.

¶ 13 Dr. Goldstein testified that he was a restorative dentist and that he had dealt with implants in that capacity for 15 to 18 years. Dr. Goldstein explained that an implant consisted of a metal core that is implanted into the jaw and solidifies with the bone, and a crown, which is the replacement tooth that is placed upon the metal implant. Dr. Goldstein also explained that when working on a dental implant as a restorative dentist, he would take molds, x-rays, and a CT scan of the patient prior to surgery and discuss the anatomical findings with the surgeon who would be placing the implant. Dr. Goldstein would also make a diagnostic wax-up, which would show the sizes of the implants and the locations at which they would be placed. The surgeon would then place the metal implant in the jaw, and Dr. Goldstein would perform the restorative work on the implant.

¶ 14 Dr. Goldstein also testified that licensed general dentists, periodontists, and oral and maxillofacial surgeons were qualified to place implants, and that the standard of care was the same regardless of whether the implant was placed by a dentist or a surgeon. Dr. Goldstein

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testified that pursuant to that standard of care, defendant was required to obtain preoperative diagnostic information, consult with other dentists involved in plaintiff's treatment, and present the information to plaintiff so she could make a decision. Dr. Goldstein opined that defendant had departed from the standard of care because the implants were not properly positioned, sized, or angulated, and defendant did not give proper consideration to plaintiff's subsequent treatment. Dr. Goldstein further testified that plaintiff's implants were not restorable because they were too severely angulated and that defendant should have taken a CT scan prior to surgery because the scan would have shown the relationship of the sinuses to the bone, the thickness of the bone, and the size and angulation at which the implants could be placed. Dr. Goldstein also opined that it would cost plaintiff about \$3,000 to remove each implant, that additional bone grafting might be necessary following the removal of the implants, and that reconstruction would cost about \$5,000 or \$6,000 per tooth.

¶ 15 On cross-examination, Dr. Goldstein stated that he had never placed an implant, had not been trained in oral surgery, and was not licensed as a specialist in oral surgery. In addition, Dr. Goldstein had not examined plaintiff or reviewed the records from Dr. Potashnick's examination of plaintiff. Dr. Goldstein acknowledged that Dr. Cabrera had related in his deposition that defendant was not required to perform a CT scan to meet the standard of care for placing an implant, and stated that he disagreed with Dr. Cabrera's opinion. Dr. Goldstein also stated that the placement of an implant in the space between teeth 24 and 25 was improper because a restorative dentist could not place two teeth on a single implant, that other alternatives were available if that space could not support two implants, and that he could not determine whether

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there was room in that space for two small implants without a CT scan of the area. Dr. Goldstein explained that defendant's decision to proceed with an implant approach to restoration was within the relevant standard of care, but that the placement of the implants was poorly executed. Dr. Goldstein further stated that a restorative dentist could not direct an oral surgeon as to the exact location to place an implant because that decision rested with the surgeon.

¶ 16 On redirect examination, Dr. Goldstein testified that defendant's records showed that defendant had extracted tooth 9, performed a bone graft on that area, and placed the implant in that same space all in the same day. Dr. Goldstein testified that it was improper for defendant to perform a bone graft and place an implant in a fresh extraction site. Dr. Goldstein also testified that Dr. Olfers made a model of plaintiff's mouth when he examined her, that defendant should have made a model of plaintiff's mouth before performing work on her, and that defendant had breached the standard of care for placing implants by failing to conduct adequate pre-planning. In addition, Dr. Goldstein testified that if the space between teeth 24 and 25 was too narrow to support two implants, then the standard of care required that defendant pursue an alternative treatment, such as a fixed bridge. Dr. Goldstein described the collaborative process between a restorative dentist and an oral surgeon in placing implants whereby the dentist determines the number of implants and the locations at which the implants will be placed, discusses those decisions with the oral surgeon, and then makes adjustments if the oral surgeon determines the implants cannot be placed in the manner previously decided by the dentist. Dr. Goldstein further testified that all of the services rendered by defendant in this case could have been provided by a general dentist and that he believed the implant in the space for tooth 8 needed to be removed

due to its angulation and the implant in the space between teeth 24 and 25 could not provide a satisfactory result because two crowns could not be placed on a single implant.

¶ 17 On further cross-examination, Dr. Goldstein acknowledged that Dr. Cabrera related in his deposition that the relevant standard of care did not require an oral surgeon to consult with the restorative dentist prior to placing an implant, and Dr. Goldstein stated that he disagreed with Dr. Cabrera's opinion on that matter. Dr. Goldstein also stated that he was not sure if defendant had taken a model of plaintiff's mouth prior to placing the implants and that he, therefore, had no opinion as to whether defendant had deviated from the relevant standard of care by failing to make a model of plaintiff's mouth.

¶ 18 On further redirect examination, Dr. Goldstein reiterated that the standard of care for placing implants required collaboration between the oral surgeon and the restorative dentist prior to surgery. Dr. Goldstein also testified that it appeared from the result of plaintiff's surgery that if defendant had made a model of plaintiff's mouth, defendant did not use it, and that the implant in the space for tooth 8 was not usable regardless of its angulation because it was not sufficiently buried within the bone. Dr. Goldstein further testified that Dr. Cabrera related in his deposition that plaintiff should have been treated with bridgework, rather than implants, and that he agreed with Dr. Cabrera's assessment.

¶ 19 Defendant testified on his own behalf that he was a licensed dentist and oral and maxillofacial surgeon and that he first examined plaintiff on July 2, 2002. At that time, defendant determined that tooth 8 was not fixable and recommended that its residual roots be removed and that it be replaced by an implant following a bone graft of the area. Defendant was

hopeful that tooth 9, which had been pushed up into the gum, was salvageable and determined that tooth 10, which was fractured, could be saved. Defendant also determined that teeth 24 and 25 were fractured and recommended that they be removed and replaced by implants.

¶ 20 Defendant also testified that on July 23, 2002, he extracted the residual roots of tooth 8, extracted teeth 24 and 25, and performed bone grafts on the affected areas. On August 13, 2002, defendant removed sutures that had been placed in plaintiff's mouth to assist in healing. On September 17, 2002, defendant added bone graft material to plaintiff's lower jaw. On March 5, 2003, defendant determined that the tooth 8 area was ready for an implant and that tooth 9 was not salvageable and needed to be replaced by an implant. That same day, defendant removed tooth 9, placed implants in the spaces for teeth 8 and 9, determined that additional bone needed to be added to plaintiff's lower jaw, and performed a bone graft to plaintiff's lower jaw. In April 2003, defendant referred plaintiff to a dentist for partial dentures. On April 30, 2003, defendant placed an implant in plaintiff's lower jaw. On July 31, 2003, defendant checked on the implants in plaintiff's upper jaw, removed the implant in the tooth 9 area because it was loose, and placed healing caps on the two remaining implants. At that time, plaintiff was not ready for restoration because she required a new implant in the space for tooth 9. Plaintiff failed to show up for her scheduled appointments on August 7 and September 13, 2003, and defendant did not have any further contact with plaintiff after July 31, 2003. Defendant further testified that he took x-rays of plaintiff, but not a CT scan, prior to placing plaintiff's implants and that defendant based his decisions regarding the exact locations at which to place the implants on x-rays and clinical examinations of plaintiff's mouth and jaw.

¶ 21 The defense also presented two videotaped evidence depositions of Dr. Paul Akers, a licensed dentist and oral and maxillofacial surgeon. In the first deposition, Dr. Akers testified that he had reviewed multiple medical records and depositions regarding defendant's treatment of plaintiff and opined to a reasonable degree of oral and maxillofacial surgical certainty that defendant had complied with the general standard of care for placing implants. Dr. Akers also testified that defendant's plan to remove plaintiff's unsalvageable teeth and replace them with implants was reasonable and that the standard of care for placing implants did not require the use of a CT scan because such scans were costly and were not necessary in every case. Dr. Akers further testified that an implant could fail to integrate into the jawbone even if it was properly placed, that the angulation on the implant in the space for tooth 8 was not the result of negligent placement, that the implant in the space between teeth 24 and 25 was properly placed, and that two small crowns could be placed on the single implant in the lower jaw. On cross-examination, Dr. Akers stated that a general dentist could place an implant and that the standard of care was the same regardless of whether the implant was placed by a dentist or a surgeon.

¶ 22 In the second deposition, Dr. Akers testified that he had reviewed Dr. Potashnick's records and deposition testimony since his prior deposition and that his opinions regarding the case had not changed. The x-ray of plaintiff's upper jaw showed that the implant in the space for tooth 8 was integrated, that its angulation was adequate, and that it was large enough to satisfy the standard of care for placing an implant. The x-ray of plaintiff's lower jaw showed that defendant's placement of the implant in the space between teeth 24 and 25 met the relevant standard of care and that the implant was integrated. Also, the decision to place one implant in

the space between teeth 24 and 25 was reasonable because there was not enough room for two implants and two crowns are often placed on a single implant to replace two missing teeth.

¶ 23 Following closing arguments, the jury returned a verdict in favor of plaintiff and against defendant for \$83,000 in damages and itemized those damages as \$26,000 for dental expenses, \$30,000 for pain and suffering, and \$27,000 for loss of normal life. The court then entered judgment in favor of plaintiff for that amount.

¶ 24 ANALYSIS

¶ 25 I. Expert Testimony

¶ 26 Defendant first contends that the circuit court erred by denying his motion to bar Dr. Goldstein from testifying as to the standard of care for placing implants. A person may testify as a medical expert if he is a licensed member of the school of medicine about which he proposes to testify and he is familiar with the methods, procedures, and treatments ordinarily observed by physicians similarly situated to the defendant. *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 112-13 (2004). If the witness fails to satisfy either of these two foundational requirements, the court must bar his testimony. *Id.* at 113. If these foundational requirements are met, the court then has the discretion to determine whether the witness is qualified and competent to state his opinion as an expert regarding the relevant standard of care. *Id.*

¶ 27 Defendant acknowledges that Dr. Goldstein is a licensed general dentist, but asserts that he fails to satisfy the first foundational requirement because he is only licensed as a general dentist, whereas defendant was licensed as a dentist and an oral and maxillofacial surgeon. However, Dr. Goldstein and Dr. Akers testified at trial that both general dentists and oral

surgeons were qualified to place implants and that the standard of care was the same regardless of whether the implant was placed by a dentist or an oral surgeon. Thus, as Dr. Goldstein is a licensed dentist and member of a school of medicine whose members are qualified to place implants, we determine that Dr. Goldstein has satisfied this first foundational requirement.

¶ 28 Defendant also asserts that Dr. Goldstein failed to satisfy the foundational requirement of familiarity with the methods, procedures, and treatments observed in placing implants because Dr. Goldstein had never performed implant surgery. Plaintiff responds that Dr. Goldstein had sufficient experience with the pre-surgery planning stage of dental implant surgery to satisfy this second foundational requirement.

¶ 29 In *Silverstein v. Brander*, 317 Ill. App. 3d 1000, 1002 (2000), the circuit court barred the plaintiff's proposed expert, an internist, from testifying that the defendant, a physiatrist, should have ceased the administration of a certain drug following hip replacement surgery when the plaintiff, who had a history of peptic ulcers, complained of stomach pain and nausea. This court reversed, noting that a court is to look to the expert's precise testimony to determine whether he is qualified as an expert regarding the relevant treatment and that the proposed testimony related to the medical management of the plaintiff, rather than the physical therapy of the plaintiff. *Id.* at 1007. We determined that the challenged witness had sufficient familiarity with the treatment at issue to qualify as an expert where the witness had worked on the medical management of more than 100 patients undergoing physical rehabilitation following hip replacement surgery, had considerable experience with the drug at issue, and had testified that all physicians, including physiatrists, should have known of the drug's effects and the risks it posed to a patient with a

history of peptic ulcers. *Id.* at 1007-08.

¶ 30 In *Rosenberg v. Miller*, 247 Ill. App. 3d 1023, 1027 (1993), the circuit court barred the plaintiff's proposed expert from testifying that the defendant had failed to meet the applicable standard of care in treating the plaintiff for a cyst because the defendant had failed to make a proper diagnosis based on the plaintiff's x-rays and had failed to make a timely referral to a proper specialist. This court reversed, holding that although the witness was a general dentist and the defendant was a periodontist, the witness could testify as an expert because his testimony did not relate to the defendant's periodontal treatment of the plaintiff where the witness was going to testify that the defendant had failed to properly read the plaintiff's x-rays and that the ability to read an x-ray was a skill required of all dentists, regardless of specialty. *Id.* at 1029-31.

¶ 31 In this case, Dr. Goldstein testified that he was a restorative dentist and for 15 to 18 years had participated in the pre-surgery and post-surgery stages of dental implant surgery. Prior to surgery, Dr. Goldstein would take x-rays and CT scans and make molds of the patients and discuss his findings with the surgeon who would be placing implants. Dr. Goldstein would also make a diagnostic wax-up, which would show the sizes of the implants and the locations at which they would be placed. Following surgery, Dr. Goldstein would perform the restorative work on the implant. Thus, although Dr. Goldstein had never placed an implant himself, he had experience and was familiar with the methods and procedures ordinarily followed before and after implant surgery.

¶ 32 Dr. Goldstein testified that defendant had failed to meet the standard of care for placing implants in this case because his pre-surgery planning was inadequate where defendant did not

consult with other dentists involved in plaintiff's treatment or perform a CT scan prior to surgery and placed an implant in the space for tooth 9 without first allowing the bone graft in that area to heal. Thus, Dr. Goldstein's testimony concerned defendant's conduct and decision making prior to performing surgery, and not defendant's conduct during the actual placement of the implants. Just as in *Silverstein* and *Rosenberg*, where the proposed witnesses were qualified to testify as experts about the defendants' conduct regarding matters within the witnesses' experience even though the witnesses did not share the defendants' expertise, here Dr. Goldstein was qualified to testify about defendant's pre-surgery conduct and decision making even though Dr. Goldstein had never placed an implant because Dr. Goldstein had substantial experience with the relevant pre-surgical planning.

¶ 33 As such, we determine that plaintiff has established that Dr. Goldstein was familiar with the methods, procedures, and treatments ordinarily observed by physicians similarly situated to defendant and that Dr. Goldstein satisfied both foundational requirements to qualify as a medical expert witness. Having done so, we note that defendant's challenge to Dr. Goldstein's ability to testify as to the standard of care for placing implants is limited to Dr. Goldstein's satisfaction of these two foundational requirements and conclude that the circuit court did not err in denying defendant's motion to bar Dr. Goldstein from testifying.

¶ 34 In reaching that conclusion, we have considered *McWilliams v. Dettore*, 387 Ill. App. 3d 833 (2009), *Hubbard v. Sherman Hospital*, 292 Ill. App. 3d 148 (1997), and *Northern Trust Co. v. Upjohn Co.*, 213 Ill. App. 3d 390 (1991), cited by defendant, and determine that they are distinguishable from this case. In *McWilliams*, 387 Ill. App. 3d at 847-50, this court held that the

plaintiff's proposed expert witness, an oncologist, was not qualified to testify as to whether the defendant, a surgeon, should have performed a biopsy on the plaintiff following the discovery of two abnormal lymph nodes because the decision of whether to perform a biopsy rested with the surgeon and the proposed witness had never performed a biopsy and held no surgical privileges. In *Hubbard*, 292 Ill. App. 3d at 153-54, this court affirmed the circuit court's order barring the plaintiff's proposed expert from testifying as to the standard of care for an emergency room physician where the witness had little emergency room experience and had merely conversed with emergency room physicians in lieu of such experience. In *Northern Trust*, 213 Ill. App. 3d at 406-07, this court held that the plaintiff's proposed expert was not qualified to testify regarding the use of a certain drug on a patient with high blood pressure to induce an abortion where the witness had never worked in an obstetrical or gynecological ward, had never been involved in a pregnancy interruption procedure, and had no experience with the drug at issue.

¶ 35 In this case, however, Dr. Goldstein's testimony concerned decisions and procedures that were not reserved for surgeons, and he demonstrated that he had gained extensive experience with those decisions and procedures during his time working with implants as a restorative dentist. Although Dr. Goldstein testified that the ultimate decision as to the exact location at which to place an implant rested with the surgeon, plaintiff's allegations related to defendant's failure to take certain steps prior to deciding whether and where to place the implants, and Dr. Goldstein had considerable experience with the relevant methods and procedures regarding such pre-surgery planning and decision making.

¶ 36

II. Rule 213

¶ 37 Defendant next contends that he was denied a fair trial by counsel for plaintiff's repeated violations of Rule 213. Supreme Court Rule 213(f)(3) (eff. Jan. 1, 2007) provides that upon written interrogatory, a party must identify its controlled expert witnesses and identify "(i) the subject matter on which the witness will testify; (ii) the conclusions and opinions of the witness and the bases therefor; (iii) the qualifications of the witness; and (iv) any reports prepared by the witness about the case." Under Rule 213(g), the expert's testimony on direct examination is limited to information disclosed in an answer to a Rule 213(f) interrogatory or a discovery deposition. Ill. S. Ct. R. 213(g) (eff. Jan. 1, 2007). The decision to admit evidence pursuant to Rule 213 is within the sound discretion of the circuit court and will not be disturbed absent an abuse of that discretion. *Sullivan*, 209 Ill. 2d at 109.

¶ 38 Defendant asserts that Dr. Goldstein testified to opinions that were not disclosed in plaintiff's Rule 213(f) interrogatory answers. Defendant first maintains that Dr. Goldstein did so when he testified on redirect examination that it was improper for defendant to perform a bone graft and place an implant in the space for tooth 9 so shortly after defendant had extracted a tooth from that site. Plaintiff disclosed in her answers to defendant's interrogatories that Dr. Goldstein would be testifying consistent with his deposition and letter of criticism. Dr. Goldstein related in his discovery deposition that the implant in the space for tooth 9 in plaintiff's upper jaw had not integrated and should not have been placed there because it was inflamed as it had recently been operated upon. Thus, the record shows that plaintiff disclosed that Dr. Goldstein would provide the challenged testimony regarding the placement of an implant in the space for tooth 9 where plaintiff disclosed that Dr. Goldstein would testify consistent with his deposition and Dr.

Goldstein addressed that issue in his deposition.

¶ 39 Defendant next maintains that Dr. Goldstein testified to opinions that were not disclosed in plaintiff's Rule 213(f) interrogatory answers when he testified on redirect examination that defendant was required to pursue an alternate treatment if the space between teeth 24 and 25 was too narrow to support two implants and that if defendant made a mold of plaintiff's mouth, he did not believe defendant used it. While the Rule 213 disclosure requirements do not restrict the cross-examination of a witness (*Stapleton ex rel. Clark v. Moore*, 403 Ill. App. 3d 147, 156-57 (2010)), that exception is limited to the cross-examining party. Ill. S. Ct. R. 213, Committee Comments (adopted Mar. 28, 2002). However, a party is not entitled to reversal based on an erroneous evidentiary ruling unless the error substantially prejudiced the aggrieved party and affected the outcome of the case. *Bosco v. Janowitz*, 388 Ill. App. 3d 450, 462-63 (2009).

¶ 40 Here, defendant was not prejudiced by Dr. Goldstein's testimony regarding an alternate treatment for the space between teeth 24 and 25 because Dr. Goldstein had already stated on cross-examination that "if the anatomical construction of the space available will not suffice to place an implant properly then an implant wouldn't be the ideal treatment solution." Also, defendant was not prejudiced by Dr. Goldstein's testimony regarding defendant's failure to use a mold of plaintiff's mouth because Dr. Goldstein had already admitted on cross-examination that he did not know whether defendant made such a mold and stated that he had no opinion as to whether defendant deviated from the relevant standard of care by failing to make a mold of plaintiff's mouth. Accordingly, Dr. Goldstein's challenged testimony did not affect the outcome of the case and there is no basis for a finding of substantial prejudice to justify reversal of the

jury's verdict.

¶ 41 Defendant next asserts that plaintiff did not disclose that Dr. Potashnick would provide standard of care testimony, that the circuit court barred counsel for plaintiff from eliciting such testimony, that counsel for plaintiff violated the court's ruling on numerous occasions, and that counsel for plaintiff succeeded in eliciting undisclosed testimony on one occasion. The party seeking reversal bears the burden of establishing that he or she was substantially prejudiced by the allegedly erroneous evidentiary ruling. *Wilbourn v. Cavalenes*, 398 Ill. App. 3d 837, 848 (2010). A court may generally cure any prejudicial impact from an erroneously asked question by sustaining an objection and instructing the jury to disregard the improper testimony. *First National Bank of La Grange v. Glen Oaks Hospital & Medical Center*, 357 Ill. App. 3d 828, 839 (2005).

¶ 42 In this case, defendant has not explained in his brief or his reply how he was prejudiced by the allegedly improper questioning. Defendant's omission is particularly problematic because the court sustained defense counsel's objections to all of the questions at issue except for one and instructed the jury to disregard much of the challenged testimony. Thus, we determine that defendant has failed to meet his burden of establishing that he was prejudiced by the allegedly improper questioning.

¶ 43 Defendant also asserts that counsel for plaintiff improperly attempted to elicit testimony from Dr. Goldstein regarding the use of a stent as a surgical guide, the availability of the results of a CT scan of plaintiff taken shortly after her fall, and the comparative cost of implants as a treatment option. However, we determine that defendant has not met his burden of establishing

prejudice where the court sustained objections to the questions at issue and defendant has provided no explanation as to how he was prejudiced. As such, we conclude that defendant was not denied a fair trial by plaintiff's alleged violations of Rule 213.

¶ 44

III. Damages Testimony

¶ 45 Defendant contends that the circuit court erred by allowing Dr. Potashnick and Dr. Goldstein to testify regarding the cost of removing and replacing plaintiff's implants and the cost of repairing and restoring plaintiff's mouth with bridges. Prior to trial, defendant filed a motion to bar Dr. Goldstein from testifying regarding those subjects, and the court granted the motion as to testimony regarding the cost of bridges and denied the motion as to the cost of removing and replacing the implants. In doing so, the court concluded that evidence regarding the cost of repairing plaintiff's mouth with bridges did not relate to defendant's alleged negligence because bridgework would have been necessary had the implants never been placed.

¶ 46 Defendant asserts in his brief that the court erred by twice allowing testimony it had previously barred in its ruling on his motion *in limine*. Defendant first maintains that "the circuit court overruled [his] objection to restorative costs when Dr. Potashnick was asked such questions, and permitted the witness to answer the question that costs of restoration for two implants would be about \$7,000." Defendant next maintains that "Dr. Goldstein was permitted to testify that to repair the implants would require removal of them at a cost of close to \$3,000 per tooth and that reconstruction would be \$5,000-\$6,000 per tooth."

¶ 47 The record shows that the court only granted that part of defendant's motion seeking to bar Dr. Goldstein from testifying as to the cost of bridgework where, after ruling that the costs

associated with bridges were not related to defendant's alleged negligence, the court stated "now [defendant] has to either replace the implants - and over defendant's objection I'm going to let that cost come in even though [plaintiff] might have said I'll never do it." Thus, although defendant maintains that the court violated its earlier ruling on his motion *in limine* when the court allowed Dr. Potashnick and Dr. Goldstein to testify as to the costs of replacing and restoring plaintiff's implants, such testimony was never barred by the court. In addition, while defendant maintains in his reply that the court erred by allowing Dr. Goldstein to testify that plaintiff required bone grafts for all three implant sites at a cost of \$1,500 each, that a bridge would have cost about \$12,000, and that a bonded bridge would have cost between \$4,000 and \$5,000, defendant has forfeited such claims by failing to include them in his appellant's brief and raising them for the first time in his reply. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.").

¶ 48 Moreover, defendant has not established that the court abused its discretion by allowing the challenged testimony. The circuit court has discretion in ruling on a motion *in limine*, and its ruling will not be disturbed absent an abuse of that discretion. *Citibank, N.A. v. McGladrey & Pullen, LLP*, 2011 IL App (1st) 102427, ¶ 13 (2011). Furthermore, a circuit court's pretrial ruling on a motion *in limine* remains subject to reconsideration by the court throughout trial. *Babikina v. Mruz*, 2011 IL App (1st) 102579, ¶ 13 (2011). Thus, defendant cannot establish that the court abused its discretion merely by showing that the court changed its pretrial ruling on defendant's motion *in limine* at trial. Accordingly, defendant only asserts that the court erred by allowing Dr.

Potashnick and Dr. Goldstein to testify inconsistently with the court's earlier ruling on the motion *in limine*, and defendant does not explain why such testimony was inadmissible or cite to any authority to support such a claim. As such, we conclude that defendant has not established that the court abused its discretion by allowing Dr. Potashnick and Dr. Goldstein to testify about the cost of removing and replacing plaintiff's implants.

¶ 49

IV. Closing Arguments

¶ 50 Defendant further contends that counsel for plaintiff made numerous improper comments during closing and rebuttal arguments. An attorney is afforded wide latitude in closing argument and may properly comment on the evidence and any inferences that may be fairly drawn from that evidence. *Clarke v. Medley Moving & Storage Inc.*, 381 Ill. App. 3d 82, 95 (2008). While improper comments during closing argument may provide the basis for a new trial (*Wilbourn*, 398 Ill. App. 3d at 854), they do not constitute reversible error unless they result in substantial prejudice to the aggrieved party (*Diaz v. Legat Architects, Inc.*, 397 Ill. App. 3d 13, 42 (2009)). The determination of whether an attorney's allegedly improper comments have substantially prejudiced the challenging party is within the sound discretion of the circuit court, and we will not reverse such a decision absent an abuse of that discretion. *Simmons v. Garces*, 198 Ill. 2d 541, 568 (2002).

¶ 51 Defendant argues that counsel for plaintiff improperly shifted the burden of proof during closing and rebuttal arguments by commenting on three occasions that defendant had not testified that he had complied with the standard of care for placing implants. However, defendant has forfeited his challenges to the comments at issue by failing to cite to any supporting authority in

his brief. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *Hirsch v. Optima, Inc.*, 397 Ill. App. 3d 102, 109 (2009). Further, defendant has forfeited his challenges to the first two comments at issue by failing to timely object to them at trial (*Simmons*, 198 Ill. 2d at 567), has not established substantial prejudice where the court advised the jury that the burden of proof remained with plaintiff following defense counsel's single objection, and has not provided an explanation in his brief or reply as to how he was prejudiced by the challenged comments.

¶ 52 Defendant takes issue with counsel for plaintiff inappropriately asking the jurors whether they would rather be treated by defendant or Dr. Potashnick and stating that counsel had sent plaintiff to see Dr. Potashnick in part due to counsel's affection for her. Defendant has forfeited his challenges to both comments by failing to cite to any supporting authority in his brief. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *Hirsch*, 397 Ill. App. 3d at 109. In addition, defendant has forfeited his challenge to the comment regarding counsel's affection for plaintiff by failing to make a timely objection at trial. *Simmons*, 198 Ill. 2d at 567. As defendant has not provided an explanation in his brief or reply as to how he was prejudiced by the challenged comments, he has failed to establish substantial prejudice.

¶ 53 Defendant next asserts that counsel for plaintiff "invented" testimony during closing argument when plaintiff's counsel argued that Dr. Olfers had examined plaintiff and that Dr. Olfers said at that time:

"[W]ell, I'm going to take an impression of your mouth here on November 6, 2003, during the time that she lost interest, and then I'm going to send you to a periodontist who places implants. I work on them. He replaces them. Here's the

model you need to take so that Dr. Cabrera can do that. It wasn't done by Dr.

Ostro."

Defendant claims that although Dr. Goldstein reviewed Dr. Olfers' deposition testimony and considered Dr. Olfers' records and reports in reaching his opinions, such matters were not before the jury and could not be brought out during closing argument. Defendant maintains that counsel for plaintiff "invented and introduced pure hearsay during closing argument," "created testimony for Dr. Ulfers [*sic*] during closing argument," and "simply made it up."

¶ 54 As noted earlier, counsel is afforded wide latitude in closing argument and may comment on the evidence and any inference that may be fairly drawn from that evidence. *Clarke*, 381 Ill. App. 3d at 95. However, "argument which is not supported by facts in evidence is improper." *Bodkin v. 5401 S.P., Inc.*, 329 Ill. App. 3d 620, 635 (2002). In this case, plaintiff testified that in late 2003, she was examined by Dr. Hanley, Dr. Olfers, and Dr. Cabrera and that none of those dentists were able to use the implants placed by defendant. In addition, Dr. Goldstein testified on redirect examination that Dr. Olfers had made a model of plaintiff's mouth when he examined plaintiff and that defendant should have made such a model prior to treating plaintiff.

¶ 55 Plaintiff's counsel's challenged comments, therefore, were based on evidence presented at trial except for the comment that defendant had not prepared a model of plaintiff's mouth prior to treating her, which was contradicted by Dr. Goldstein's testimony that he did not know whether defendant had taken a model of plaintiff's mouth prior to placing the implants. To the extent the comment was improper, it was brief and isolated and, immediately after it was made, the court advised the jurors that counsel's argument was not evidence and directed them to "use your

collective memory as to what was stated and what was not stated by the evidence." In addition, defendant has not explained how he was prejudiced by this single remark, and we find that the court did not abuse its discretion such that reversal is warranted.

¶ 56 Defendant next asserts that counsel for plaintiff improperly commented on evidence that should have been barred as hearsay when counsel argued that Dr. Hanley, Dr. Olfers, and Dr. Cabrera agreed that plaintiff's implants were not restorable. Defendant, citing *Kim v. Nazarian*, 216 Ill. App. 3d 818 (1991), maintains that Dr. Goldstein's testimony that his opinion that plaintiff's implants were not restorable was consistent with the opinions reached by Dr. Hanley, Dr. Olfers, and Dr. Cabrera was inadmissible hearsay. In *Wilson v. Clark*, 84 Ill. 2d 186, 193-96 (1981), our supreme court adopted Federal Rule of Evidence 703, which provided that an expert could base his opinion on facts not in evidence.

¶ 57 As noted earlier, a party is not entitled to reversal based on an erroneous evidentiary ruling unless the error substantially prejudiced the aggrieved party and affected the outcome of the case (*Bosco*, 388 Ill. App. 3d at 462-63), and the party seeking reversal bears the burden of establishing prejudice (*Wilbourn*, 398 Ill. App. 3d at 848). In his brief, defendant asserts that Dr. Goldstein's testimony was inadmissible hearsay and then cites to this court's holding in *Tierney v. Community Memorial General Hospital*, 268 Ill. App. 3d 1050 (1994), and correctly maintains that an attorney's improper comments during closing argument may constitute reversible error if they cause substantial prejudice. In the next sentence, defendant asserts that "[i]n this instance, such prejudice is shown." Defendant, however, does not then provide an explanation regarding how he was prejudiced by the admission of the challenged evidence. Defendant's omission is

particularly problematic in this case because it is unclear whether defendant was prejudiced by the challenged testimony where the jury could have inferred that Dr. Hanley, Dr. Olfers, and Dr. Cabrera had determined that the implants were not restorable from plaintiff's testimony that all three dentists had examined her and were unable to use the implants. As such, defendant has not established that the court committed reversible error by allowing inadmissible hearsay or that he was prejudiced by counsel's allegedly improper comments regarding that evidence.

¶ 58 Defendant next asserts that counsel for plaintiff improperly "created testimony" when counsel commented during closing argument that he had sent plaintiff to be examined by Dr. Potashnick "because I trust his opinion." Defendant has forfeited his challenge to the comment by failing to cite to any supporting authority in his brief. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *Hirsch*, 397 Ill. App. 3d at 109. In addition, defendant has forfeited his challenge to the comment by failing to timely object to it at trial. *Simmons*, 198 Ill. 2d at 567. Further, defendant has not established substantial prejudice where he has provided no explanation in his brief or reply as to how he was prejudiced by the challenged comment.

¶ 59 Defendant next asserts that counsel for plaintiff improperly "created testimony" when he argued:

"One of the things that Dr. Ostro has tried to hide behind is that I'm an oral maxillofacial surgeon as is Dr. Akers, but he didn't do any oral or maxillofacial work. If she had a broken jaw and he fixed her jaw, that would be what an oral surgeon would do. If she had TMJ and he had to cut out parts of her jaw to make her jaw aligned - he didn't do any of those. He did what a dentist does."

Once again, defendant has forfeited his challenge to the comment by failing to cite to any supporting authority in his brief. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *Hirsch*, 397 Ill. App. 3d at 109. In addition, defendant has forfeited his challenge to the comment by failing to timely object at trial. *Simmons*, 198 Ill. 2d at 567. Also, counsel's comments were based on evidence presented at trial where Dr. Goldstein and Dr. Akers testified that both general dentists and oral surgeons were qualified to place implants. Further, defendant has not established substantial prejudice as he has provided no explanation in his brief or reply as to how he was prejudiced by the challenged comment.

¶ 60 Defendant further asserts that counsel for plaintiff improperly argued that Dr. Potashnick testified that defendant had departed from the relevant standard of care. Defendant has forfeited his challenge to the comment by failing to cite to any supporting authority in his brief. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *Hirsch*, 397 Ill. App. 3d at 109. In addition, defense counsel objected to plaintiff's counsel's comment and any prejudice caused by the allegedly improper comment was cured when the court sustained that objection and reminded the jury that the witness did not testify that defendant had departed from the relevant standard of care. *Simmons*, 198 Ill. 2d at 567. Although the court may have caused some confusion by mistakenly saying that Dr. Goldstein had not testified regarding the standard of care instead of Dr. Potashnick, the effect of that mistake was minor, and defendant has not explained in his brief or reply how he was prejudiced by the comment. As such, we conclude that the circuit court did not abuse its discretion in its handling of closing and rebuttal arguments and that a new trial is not warranted in this case.

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¶ 61

CONCLUSION

¶ 62 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 63 Affirmed.